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IN THE

Supreme Court of the United States

OCTOBER TERM, 1903

HANNAH O'CALLAGHAN and EDWARD CORCORAN, *Petitioners,*

v.

TERENCE O'BRIEN as Administrator of the Estate of John Sullivan, deceased, and MARIE CARRAU, *Respondents.*

No. 893. 1903.

PETITION FOR WRIT OF CERTIORARI

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HANNAH O'CALLAGHAN and EDWARD CORCORAN, *Petitioners,* v. TERENCE O'BRIEN as Administrator of the Estate of John Sullivan, deceased, and MARIE CARRAU, *Respondents.*	No. 593. October Term, 1903.

PETITION FOR WRIT OF CERTIORARI

To the Honorable the Supreme Court of the United States:

The petition of Hannah O'Callaghan and Edward Corcoran respectfully shows:

In this suit the Circuit Court of the United States for the District of Washington entered a decree which adjudged complainants, these petitioners, to be heirs at law and next of kin of one John Sullivan, deceased, who died intestate in King County, in the State of Washington, leaving there an estate of real and personal property exceeding in value three hundred thousand dollars; directed the respondent Terence O'Brien as Administrator of such estate to recognize the petitioners as such heirs and next of kin; adjudged that an alleged *nuncupative will,*

under which the respondent Marie Carrau claimed the entire estate, had never been made; that its probate was a nullity, and enjoined Marie Carrau from making any claim to the estate under either the alleged will or its probate. (R. p. 245.)

The United States Circuit Court of Appeals for the Ninth Circuit erred in reversing the decree of the Circuit Court for want of jurisdiction of the subject matter of the suit, and directing that the bill be dismissed. (R. pp. 1433, 1452.)

The Circuit Court of Appeals erred in holding (R. pp. 1433-1452):

1st. That two British subjects, heirs at law and next of kin of a decedent who died in King County, Washington, leaving real and personal property there, worth upwards of three hundred thousand dollars, could not maintain a suit in the Circuit Court of the United States for the District of Washington against the administrator of the estate of the deceased, and one claiming the entire estate under an alleged nuncupative will of the deceased, probated by a decree of a court of general jurisdiction, regular upon its face, void in fact, and obtained by fraud, to annul such alleged will and its fraudulent probate, although for jurisdictional purposes the amount involved was sufficient and the requisite diversity of citizenship existed, and by the law of the State of Washington, customary and statutory, an equitable proceeding could be maintained between the same parties for the same relief in a court of the state exercising general jurisdiction.

2nd. That the Circuit Court of the United States for the District of Washington had no jurisdiction of the subject matter of a suit by such heirs against such administrator and such claimant, to construe the alleged nuncupative will and determine it invalid on its face.

3rd. That the Circuit Court of the United States for the District of Washington had no jurisdiction of a suit between such parties to construe the alleged nuncupative will and determine that real estate was not conveyed by it.

4th. That if the Circuit Court of the United States for the District of Washington otherwise had jurisdiction of any one of the foregoing controversies, the fact that the claimant under the alleged nuncupative will pleaded that persons other than the petitioners in this suit also claimed to be the only heirs of the deceased, who could not be made parties because of their

citizenship, deprived the Circuit Court of the United States of jurisdiction to determine the controversies between the parties before the court, although no decree could be entered affecting in any manner the rights of such absent claimants, and though the parties before the court all contended that the claims of such absent persons were without foundation in fact.

The history of the suit, as shown by the record, is as follows:

John Sullivan, a bachelor, sixty years of age, a resident of Seattle, King County, Washington, died there on the 26th day of September, 1900, intestate. He left surviving him as heirs at law and next of kin his first cousins, the petitioners, residents of Ireland, and subjects of the King of Great Britain and Ireland. He left an estate in King County, Washington, consisting of realty worth upwards of three hundred thousand dollars, and personalty of the value of about fifteen thousand dollars. Immediately upon his death, a special administrator of his estate was appointed who took charge of his estate (R. pp. 6, 64). A number of persons filed petitions in the Superior Court of the State of Washington for King County, in which they alleged that they were creditors of Sullivan, and prayed that letters of administration upon his estate should issue. Each petitioner for letters of administration named a different nominee for the office of general administrator of the estate (R. p. 991).

Some months prior to his death, Sullivan visited the Paris Exposition. He returned to Seattle, intending at an early date to again visit France (R. pp. 6, 64). On his visit to France he had been embarrassed by his ignorance of French (R. p. 768). When he returned to Seattle, he boarded and lodged at the house of one Louis Daussat, and took lessons in French from the respondent Marie Carrau, a sister-in-law of Daussat residing in the same house (R. pp. 479, 523). For his board, lodging and tuition Sullivan paid thirty-five dollars per week (Ex. Y 18, R. p. 923). He had never seen Marie Carrau prior to the 31st day of July, 1900 (R. pp. 478, 505). She claims that on September 1st, 1900, Sullivan asked her to marry him (R. p. 519). On that day he paid his bill for his week's board, lodging and tuition, and received a receipt therefor (Ex. Y 18, R. p. 523). She claims that on September 8, 1900, he again asked her to marry him, promised her all of his property, and that she consented to marry him. On that day he again paid his bill for board, lodging and tuition (R. p. 485; Ex. Y 18, R. p. 523). He continued to make his weekly payments for board,

lodging and tuition after his illness and until a few days before his death (Ex. Y 18, R. pp. 523, 506). Marie Carrau claims that on September 25, 1900, the night before he died, Sullivan, *by an oral will*, devised and bequeathed to her his entire estate; that the will was made in the presence of her brother-in-law, her sisters, herself, and no one else, and that Sullivan died the next morning.

Sullivan was a Roman Catholic. No priest was called to minister to him, although a telephone was in the house. A physician lived next door, but his assistance was not sought (R. pp. 435, 461, 534).

Sullivan died on September 26, 1900. On October 5th, 1900, Louis Daussat, the brother-in-law of Marie Carrau, and Marie Carrau, signed and, on October 8th, 1900, filed their petition in the Superior Court of the State of Washington for King County, wherein they alleged that Sullivan had died *intestate;* that at the time of his death he was *indebted to them;* and they prayed that I. D. McCutcheon, Esq., should be appointed administrator of the estate (Ex. Y 25, R. p. 928).

The various petitions for general letters of administration and for the appointment of a general administrator were duly brought on for hearing November 18th, 1900. On the 19th day of November, 1900, the Superior Court in the proceeding in which Marie Carrau and Louis Daussat petitioned as creditors for the appointment of a general administrator on the ground that Sullivan had died intestate, found by its decree appointing a general administrator that Sullivan had died intestate and indebted to them in a small sum. The respondent Terence O'Brien was appointed general administrator of the estate (Ex. Y 46, R. p. 991). He duly qualified as such, and entered upon the discharge of his duties. *On the 8th day of March*, 1901, the respondent Marie Carrau filed in the Superior Court of the State of Washington for King County her petition, in which she alleged that at about the hour of 11 o'clock P. M. on the 25th day of September, 1900, Sullivan, while in the actual contemplation, expectation and fear of death, and in the presence of herself, Louis Daussat, Augustine Daussat and Hermance Carrau, made *a nuncupative will* in the following words:

"I want you to remember *and witness* that I *will all my property* and personal effects, *worth many thousands of dollars*, to be the money and property of *your sister, Marie Carrau. I am sick, and we know not what might happen.*"

In her petition she also alleged that the will was made at the house wherein Sullivan had resided for more than ten days immediately preceding his death; that Sullivan requested the persons named to bear witness to his will; that the words constituting the will had been reduced to writing, and that the writing accompanied her petition; that the time of his death Sullivan was a bachelor; that he left personal property of the value of fifty thousand dollars and real estate of the probable value of four hundred and fifty thousand dollars (Ex. Y 28, R. p. 936). This petition was presented to the Judge of the Superior Court of the State of Washington for King County at *about half past eleven o'clock a. m., March the 8th*, 1901. (Ex. Y 29, R. p. 941).

A nuncupative will, under the laws of Washington, is invalid where the estate bequeathed exceeds two hundred dollars.

Section 6 of the Organic Act of the Territory of Washington, approved March 2nd, 1853 (U. S. Stats. at Large, Vol. 10, pp. 172, 175), is as follows:

"Sec. 6. * * To avoid improper influences which may result from intermixing in one and the same act such things as have no proper relation to each other, *every law shall embrace but one object, and that shall be expressed in the title.*"

The Territorial Legislature, at its first session, in 1854, enacted a statute entitled:

"An Act establishing probate courts for the Territory of Washington."

Laws of 1854, Territory of Washington, p. 309.

At the same session the legislature enacted a statute entitled:

"An Act relating to Wills."

Laws of 1854, Territory of Washington, p. 312.

Sec. 23 of this act provides:

"*No nuncupative will* shall be good when the estate bequeathed *exceeds the value of two hundred dollars, nor* unless the same be proven by two witnesses who were present at the making thereof, nor unless it be proven that the testator at the

time of pronouncing the same did bid some person present to bear witness that such was his will, or to that effect; nor unless such nuncupative will was made at the time of the last sickness and at the dwelling house of the deceased, or where he had been residing for the space of ten days or more, except where such person was taken sick from home and died before his return."

No change was attempted to be made in the amount of an estate which could be bequeathed by nuncupative will, until November 11, 1873, when the Legislature of the Territory, by an act approved on that date, entitled:

"An Act *defining* the *jurisdiction* and *practice* in the probate courts of Washington Territory,"

omitted the word "nor" after the words "two hundred dollars" and before the word "unless," and thereby, if the repeal was valid, removed the limitation on the amount of an estate which might be bequeathed by nuncupative will (Laws of 1873, pp. 252, 259), making the section read as follows:

"Sec. 33. No nuncupative will shall be good when the estate bequeathed exceeds the value of two hundred dollars (—) unless the same be proved by two witnesses. * * *"

Section 33 of the Act of November 11, 1873, was re-enacted by the Territorial Legislature by an act approved December 1, 1881, entitled:

"An Act *defining* the *jurisdiction* and *practice* in the probate courts of Washington Territory."

Pierce's Code of Washington, p. 355.

There is nothing in the title of the act of November 11, 1873, nor in the title of the act of December 1, 1881, in any manner relating to the subject of wills. The subject of wills is not mentioned in the title of either of those acts. The section in the body of each of those acts, re-enacting Section 23 of the Act of 1854, but omitting the word "nor" and by such omission repealing the limitation imposed by section 23 of the Act of 1854 upon the amount of an estate which might be bequeathed by nuncupative will, is in conflict with the provision of Section 6 of the Organic Act of the Territory, which requires that every law of the Territory—

"—shall embrace but one object, and that shall be expressed in the title."

There has been no legislation relating to nuncupative wills since the Territory of Washington became a State.

A nuncupative will cannot, under the law of Washington, be probated ex parte.

"No proof shall be received of any nuncupative will unless it be offered within six months after speaking the testamentary words, nor unless the words or the substance thereof be first committed to writing *and a citation issued to the widow or next of kin of the deceased, that they may contest the will if they think proper.*"

Pierce's Washington Code, Sec. 2352. Ballinger's Code, Sec. 4606 (Laws of 1854, Section 25.)

"In all cases in which citations are issued from the Superior Court in probate proceedings, *they shall be served at least ten days before the term at which they are made returnable*, except when issued from the court in cases where the law requires the judge to issue them upon his own motion and he does so issue them, *and in such cases they shall be served in sufficient time to allow the person served to be in attendance on the court.*"

Pierce's Code of Washington, Sec. 2331. Ballinger's Code, Sec. 6083.

A written will is probated in Washington *ex parte*. Laws 1854, Section 17.

Pierce's Code of Washington, 2385. Ballinger's Code, 6100.

The law of the State of Washington with reference to the contest of a will admitted to probate is as follows:

"If any person interested in any will shall appear within one year after the probate or rejection thereof, and by petition to the superior court having jurisdiction contest the validity of said will, or pray to have the will proven which has been rejected, he shall file a petition containing his objections and exceptions to said will, or to the rejection thereof. Issues shall be made up, tried and determined in said court respecting the

competency of the deceased to make last will and testament, or respecting the execution by the deceased of such last will and testament under restraint or undue influence or fraudulent representations, or for any other cause affecting the validity of such will."

Pierce's Code of Washington, Sec. 2395. Ballinger's Code, 6110.

"Upon the filing of the petition referred to in the next preceding section a citation shall be issued to the executors who have taken upon them the execution of the will, or to the administrators with the will annexed, and to all legatees named in the will residing in the territory (state), or to their guardians if any of them are minors, or their personal representatives if any of them are dead, requiring them to appear before the court on a day therein specified, to show cause why the petition should not be granted."

Pierce's Code, Sec. 2396. Ballinger's Code, 6111.

"If no person shall appear within the time aforesaid, the probate or rejection of such will shall be binding, save to infants, married women, persons absent from the United States, or of unsound mind, a period of one year after their respective disabilities are removed."

Pierce's Code, Sec. 2397. Ballinger's Code, 6112.

At half past eleven o'clock a. m., March the 8th, 1901, upon the presentation to the judge of the petition for the probate of the alleged nuncupative will, he made an order that a citation issue directed to the widow or next of kin of the deceased, requiring them to appear before the court *at a time then already past*, namely, ten o'clock a. m. of the same day, to show cause why the nuncupative will should not be admitted to probate. (Ex. Y 29, R. pp. 941, 324-326.) The citation immediately issued, directed to the widow and next of kin, requiring them to appear at ten o'clock a. m., March the 8th, 1901, *a time then already past*, and show cause why the will should not be admitted to probate. The citation was immediately placed in the hands of the sheriff for service, and without leaving his office he returned that he could not find any widow or next of kin of the deceased in King County. The return was immediately presented to the judge (R. pp. 325-328).

The testimony of the witnesses to the alleged will was immediately received by the court. These witnesses were Louis Daussat, a brother-in-law of the claimant under the nuncupative will, and her sisters, Augustine Daussat and Hermance Carrau. Immediately upon giving their testimony, these witnesses signed previously prepared typewritten affidavits in support of the will (R. pp. 324-326).

At this time the general administrator of the estate was in the City of Seattle, King County, in the discharge of the duties of his office. He had no knowledge of the proceeding to probate the will, nor was notice given to him or anyone else of the proceeding (R. pp. 327, 328). At this time there were on file in the office of the Clerk of the Court in the proceedings in the administration of the estate, two notices signed by counsel, resident in Seattle, representing certain persons (other than these petitioners), claiming to be heirs of the deceased. No notice of the proceeding to probate the will was given to counsel representing those parties. The existence of those claims was not disclosed to the court (R. pp. 931, 934, 325-328).

The court immediately upon hearing the testimony, made a certificate of the probate of the will, and immediately entered a decree thereon adjudging that the court had acquired jurisdiction, that the will was entitled to probate, and admitting it to probate (R. pp. 324-326; Ex. Y 31, p. 945; Y 32, p. 949). The certificate of probate and the decree of probate were typewritten documents which had been prepared in advance of the probate proceedings (R. p. 325).

On March 26th, 1901, Marie Carrau, by her attorneys, filed her petition for the revocation of O'Brien's letters of administration (Ex. Y 41, R. pp. 974-976).

After March 26, 1901, and *prior to March* 30, 1901, one of Marie Carrau's attorneys, who had assisted in the probate of the alleged will, became the attorney for the administrator (R. pp. 338, 339).

On March 30, 1901, the petition for the revocation of O'Brien's letters of administration was withdrawn without prejudice (Ex. Y 41, R. pp. 977, 978). On May 21, 1901, Marie Carrau filed her petition in the Superior Court for King County, and prayed for the distribution of the entire estate to her as the owner thereof under the nuncupative will, one of her attor-

neys being also attorney for the administrator (Ex. Y 40, R. p. 971).

The hearing of her petition was fixed by the court for the 21st day of June, 1901 (Ex. Y 40, p. 971, 15). On the 20th of June, 1901, these petitioners filed their bill in equity in the Circuit Court of the United States for the District of Washington (R. pp. 6-15), wherein they alleged substantially the foregoing facts, the requisite diversity of citizenship, the amount involved in the controversy, that the alleged nuncupative will had been manufactured by the respondent Marie Carrau and her sisters and brother-in-law, and that they had conspired together to obtain for themselves all the property of John Sullivan, deceased, by means of false testimony and by the manufacture of evidence to support the pretended nuncupative will.

In their bill these petitioners further alleged that the Superior Court of the State of Washington for King County acted wholly without jurisdiction in the matter of the probate of the alleged will; that the court never acquired jurisdiction to hear any evidence or take any step for the probate of the will; that no legal citation had been issued out of said court; that ten days had not elapsed between the filing of the pretended will and the hearing of the pretended proof in support of it; that under the law of the State of Washington a nuncupative will was invalid where the estate bequeathed exceeded the value of two hundred dollars, and that a nuncupative will, even if valid, could not dispose of real estate.

The bill further alleged that the estate was very little in debt; that the complainants were, even if the alleged will should be held valid, entitled to all of the real estate and the rents, issues and profits thereof since the death of Sullivan; that they were informed that the Superior Court would order the administrator to deliver the entire estate to Marie Carrau under the alleged will; that the administrator would obey the order, and that the action of the court and of the administrator would deprive the complainants of their property without due process of law, in violation of their rights under the Fourteenth Amendment to the Constitution of the United States; that the respondent Marie Carrau was insolvent; that if possession of the estate was delivered to her, she would transfer it to various persons and render it necessary for the complainants to institute a multiplicity of suits to protect their rights in the property, and that they had no adequate remedy at law.

They prayed as follows:

That the pretended nuncupative will should be adjudged null and void and of no force and effect whatever; that in the event that the will should not be adjudged null and void, the same should be adjudged not to pass any title to the real estate of the deceased, nor to any of the rents, issues and profits issuing out of said real estate since the death of the deceased; that the respondent Marie Carrau be perpetually restrained and enjoined from setting up any title or claim under the pretended will; that the administrator should be restrained from turning over any of the property to her, and that she should be enjoined from receiving possession of any of the property, and from in any manner interfering with it; that upon the final hearing and determination of the suit, complainants should be adjudged to be the only heirs at law of the deceased and entitled to his whole estate, and that the administrator should surrender the same and account therefor to them (R. pp. 6-15).

Upon the filing of the bill, process was immediately issued and served upon each of the respondents. On the same day, but later in the day, the petitioners filed a petition in the Superior Court of the State, alleging that Sullivan had died intestate, and setting forth substantially the same facts alleged in their bill in the Circuit Court of the United States, and in said petition stated that the filing of the petition was without prejudice to their right to carry on the suit instituted by them in the Circuit Court of the United States (Ex. Y 33, R. p. 954). In the Circuit Court the administrator filed a disclaimer of any interest in the controversy between the petitioners and the respondent Marie Carrau (R. p. 33).

The respondent Marie Carrau filed various papers in the Circuit Court of the United States for the District of Washington, wherein she claimed that the Superior Court of the State of Washington for King County was the only court having jurisdiction of the controversy between the petitioners and herself. Upon her objection to the jurisdiction of the Circuit Court being overruled, and after the Circuit Court had set aside an order of default which had been entered against her, she filed her answer, in which she alleged that the petitioners were not related to the deceased; admitted that the deceased left no relation nearer than first cousin; alleged the making of the nuncupative will; that it was valid; that it conveyed the entire estate to her; that the Superior Court duly probated the will; that the court acquired jurisdiction; that the citation was regularly issued; that the decree of probate entered on the 8th day of March, 1901, was in full force and effect; that the Su-

perior Court for King County had entire jurisdiction of the matter; denied that the distribution of the estate to her by the Superior Court of King County under the nuncupative will, and the decree probating the same, would be in violation of the rights of complainants under the Fourteenth Amendment to the Constitution of the United States; and denied that they would be deprived of any property without due process of law by a decree of distribution to her; that persons other than complainants had filed claims in the Superior Court claiming to be the sole heirs of the deceased, and that those claims were pending in the Superior Court (R. pp. 35, 64, 79).

A general replication to this answer was filed (R. p. 84). Evidence was duly taken in the suit. A large number of witnesses were examined in Ireland. The Circuit Court of the United States for the District of Washington rendered the decree before referred to in favor of these petitioners; adjudged that the Superior Court of the State of Washington had never acquired any jurisdiction to probate the alleged will; that the alleged will had never been made, nor had Sullivan ever spoken the words alleged to constitute his will, or any words of similar import; directed the administrator to recognize these petitioners as the heirs at law and next of kin of the deceased, and as such entitled to share in his estate, and enjoined Marie Carrau from making any claim to the estate or any part thereof under the alleged will and its alleged probate, or either, except in a court having appellate jurisdiction to review the decree (R. p. 243). Respondent Marie Carrau appealed from the decree of the Circuit Court to the United States Circuit Court of Appeals for the Ninth Circuit (R. pp. 253-258). The Circuit Court of Appeals declined to consider the merits of the case, and entered a decree reversing the decree of the Circuit Court, with directions to dismiss the bill (R. p. 1452). These petitioners filed a petition for a rehearing in the Circuit Court of Appeals, and prayed that court to set aside its decree of reversal, and to certify to this court for determination the question whether the Circuit Court of the United States for the District of Washington had jurisdiction of the suit. On the 9th day of November, 1903, the petition for rehearing was denied (R. p. 1453). Thereafter these petitioners filed their petition, praying the allowance of an appeal from the decree of the Circuit Court of Appeals to this court, on the ground that the jurisdiction of the Circuit Court of the United States for the District of Washington was not dependent upon diversity of citizenship only, because complainants had alleged facts showing that the state court had entered a decree affecting the property of

these petitioners, without having acquired any jurisdiction of the proceeding in which such decree was entered, and that the distribution of the estate to the respondent Carrau under the alleged will and the decree probating the same, entered without jurisdiction, would deprive these petitioners of their property without due process of law, in contravention of the Fourteenth Amendment to the Constitution of the United States. With the petition for the allowance of their appeal, the petitioners filed their assignments of error, in which they alleged, among other things, that the jurisdiction of the Circuit Court of the United States for the District of Washington being invoked on the ground that the suit involved the construction and application of the Constitution of the United States, the Circuit Court of Appeals was without jurisdiction of an appeal from the decree of the Circuit Court, because the Supreme Court had exclusive jurisdiction of an appeal from a decree of the Circuit Court in such case (R. p. 1455).

The appeal prayed for by the petitioners was duly allowed, and has been perfected, and the cause has been docketed in this court as No. 593 of the October Term, 1903.

Your petitioners respectfully show to the court that if the allegations of the bill did not set forth facts showing a real and substantial controversy, depending on the construction or application of the Constitution of the United States, then it may be that the decision of the United States Circuit Court of Appeals was final, and the only means by which said decree can be reviewed is by the issuance out of this court of a writ of certiorari. In the ordinary course of the business of this court, if jurisdiction of the appeal should be denied, it will be too late for this court to then acquire jurisdiction of this suit by a writ of certiorari.

The decision of the United States Circuit Court of Appeals in this suit is in conflict with the decision of the same court when presided over by Mr. Justice McKenna, then Circuit Judge, in

Richardson v. Green, 61 Fed., p. 423.

In that case the court said:

"If a suit is essentially a suit of a civil nature, for equitable relief, and it is customary to prosecute the same *in any state court* where the action arose, whether the same is *a county court*

or *a probate court* or *a District or Circuit Court*, the proper Federal Court will have *concurrent jurisdiction* of the same with such state courts, where the amount is sufficient and the parties are citizens of different states, as prescribed by the United States statutes."

The jurisdiction of the Circuit Court of the United States for the District of Oregon to entertain a suit to set aside a will as a forged instrument, and a decree probating the same on the ground that it was obtained by fraud, was sustained.

The defendants in that case applied to this court for a writ of certiorari, wherein they alleged that the Circuit Court of the United States for the District of Oregon had no jurisdiction to entertain such a suit, because none of the courts of the State of Oregon had jurisdiction to entertain a suit between parties for such relief.

The first paragraph of the brief of counsel in that case on their application for the writ of certiorari, is as follows:

"The Circuit Court of the United States for the District of Oregon is without jurisdiction to decree a will invalid and cancel the same, none of the courts of the State of Oregon having jurisdiction to entertain a suit between parties for such relief." (Page 1 of petitioners' brief.)

The application for the writ was denied by this court.

Richardson v. Green, 159 U. S., 264.

Your petitioners also respectfully show to the court that the decision of the Circuit Court of Appeals in this suit is in conflict with the following decisions:

Decisions of This Court.

Byers v. McAuley, 149 U. S. 608.
Richardson v. Green, 159 U. S. 264.
Ellis v. Davis, 109 U. S. 485.
Gaines v. Fuentes, 92 U. S. 21.
Broderick's Will, 21 Wall. 503.
Payne v. Hook, 7 Wall. 425.

Decisions of the United States Circuit Court of Appeals.

Richardson v. Green, 61 Fed. 423 (Ninth Circuit).
Sawyer v. White, 122 Fed. 223 (Eighth Circuit).
Williams v. Crabbe, 117 Fed. 193 (Seventh Circuit).

Decisions of Circuit Courts.

Wart v. Wart, 117 Fed. 766.
Broadhead v. Shoemaker, 44 Fed. 518.
Everhart v. Everhart, 34 Fed. 82.

Decisions of the Supreme Court of the State of Washington.

Clayson v. Clayson, 26 Wash. 253.
Filley v. Murphy, 30 Wash. 1.
Browder v. Phinney, 30 Wash. 74.
Higgins v. Nethery, 30 Wash. 239.
State ex rel. Stratton v. Tallman, 25 Wash. 295.
State ex rel. Stratton v. Tallman, 29 Wash. 317.
Reformed Presbyterian Church v. McMillan, 31 Wash. 643.
Bower v. Bower, 5 Wash. 225.
Mason v. McLean, 6 Wash. 31.
Hill v. Hill, 7 Wash. 408.
Purdy v. Davis, 13 Wash. 164.

Your petitioners submit that it is of the utmost importance that the rule should be uniform throughout the Circuits of the United States that whenever by the law of a state, customary or statutory, a proceeding *inter partes* can be maintained in a state court of general jurisdiction for the annulment of a will and its probate, a suit can be maintained in the Circuit Court of the United States sitting in the same state, when the amount involved is sufficient and the requisite diversity of citizenship exists for the purposes of jurisdiction.

Jurisdiction denied because of non-joinder of parties whose joinder would oust the court of jurisdiction.

The petitioners are aliens. Respondents are citizens of the United States. Diversity of citizenship existed. The respond-

ent Marie Carrau pleaded that petitioners were not related to the deceased (R. p. 65). She claimed that the deceased left no relatives (R. pp. 439, 483). She did not plead that the deceased left heirs who should be made parties. She pleaded that certain persons claimed to be the only heirs of the deceased. She claimed that the alleged will gave her the entire estate, whether the deceased left heirs or not. She admitted that there were no persons nearer of kin than first cousins (R. p. 65). If Marie Carrau had shown that the petitioners were not related to the deceased, she would have defeated them; if she had shown that there was any person of nearer kin to the deceased than the petitioners, she would also have defeated them; if she had shown that the alleged will was valid, legally probated, and that it conveyed real estate, she would have defeated them.

Under the statute of Washington *any person interested* in any will may contest it.

Sec. 2395, Pierce's Code, *supra.*

The persons to be made defendants in the contest are the executors or administrator and the legatees, named in the will, residing in the state.

Sec. 2396, Pierce's Code, *supra.*

All persons required by the statute were before the court in the case at bar. The Circuit Court of Appeals held that the non-joinder as defendants of persons whose joinder would oust the court of jurisdiction, and which persons both the petitioners and respondent claimed were not related to the deceased and had no interest in his estate, deprived the court of jurisdiction to determine the controversy between the parties, actually before the court, between whom the requisite diversity of citizenship did exist. The decisions of the courts of the United States are directly to the contrary.

Byers v. McAuley, 149 U. S. 608.
Williams v. U. S., 138 U. S. 514.
Kerr v. Watts, 6 Wheat. 160.
Ellendorff v. Taylor, 10 Wheat. 360.
Williams v. Crabb, 117 Fed. 193.
Vattier v. Hinde, 7 Peters 252, 263.
Storey v. Livingston, 13 Peters, 359, 375.
Fisher v. Shropeshire, 147 U. S. 133.
Railway Co. v. Stewart, 95 U. S. 284.

Dick v. Balch, 8 Peters 36.
Osborne v. U. S. Bank, 9 Wheat. 738, 857.
U. S. v. Hendy, 54 Fed. 447.
Billings v. Aspen Mining Co., 51 Fed. 338.
Smith v. Lee, 77 Fed. 779.
Hamilton v. Savannah R. R., 49 Fed. 412.

Your petitioners present herewith, as a part of this petition, a brief presenting more fully the questions involved and showing the importance of those questions.

Inasmuch as there is doubt whether the right of appeal exists in this case, your petitioners have applied promptly to this court for a writ of certiorari to review the decree of the Circuit Court of Appeals. The Circuit Court of Appeals has superseded its decree and stayed its mandate until the final determination of this suit by this court, and the record in the suit is now on file in this court.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding said court to certify and send to this court on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of said Court of Appeals in this case, which was entitled in that court,

"MARIE CARRAU, *Appellant,*

v

HANNAH O'CALLAGHAN, otherwise known as JOHANNA CALLAGHAN, and EDWARD CORCORAN, *Appellees,*"

to the end that said cause may be reviewed and determined by this court as provided by law; that the record now on file be deemed and taken as the return to said writ, and that your petitioners may have such other and further relief or remedy in the premises as to this court may seem appropriate; and that the said decree of the said Circuit Court of Appeals may be reversed by this Honorable Court.

HANNAH O'CALLAGHAN and
EDWARD CORCORAN.

By JAMES B. HOWE, Their Counsel.

SAMUEL H. PILES,
GEORGE DONWORTH,
C. H. FARREL, of Counsel.

State of Washington, }
County of King. } ss.

James B. Howe being first duly sworn, on oath deposes and says: I have read the foregoing petition and know the contents thereof and believe the same to be true. I make this affidavit for and on behalf of the above named petitioners, for the reason that one of said petitioners is a resident of Cork, Ireland, and the other of Dublin, Ireland, and neither of them is now within the United States. I am and have been one of the solicitors and counsel for the petitioners in the suit mentioned in the foregoing petition, and in all proceedings connected therewith.

JAMES B. HOWE.

Sworn to and subscribed before me
this 21st day of March, 1904.

[Official Seal.]

GEORGE F. VANDERVEER.
Notary Public in and for the State of
Washington, residing at Seattle.

I hereby certify that I am counsel for the petitioners named in the foregoing petition for writ of *certiorari*. I have read the foregoing petition, know the contents thereof, believe the same to be true, and my opinion is that the foregoing petition is well founded in law.

JAMES B. HOWE,

Counsel for Petitioners.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1903

HANNAH O'CALLAGHAN and EDWARD CORCORAN, *Petitioners,*

vs.

TERENCE O'BRIEN, as Administrator of the Estate of John Sullivan, deceased, and MARIE CARRAU, *Respondents.*

No. 593

Notice of Application to Supreme Court for Writ of Certiorari.

To Terence O'Brien, as Administrator of the Estate of John Sullivan, deceased, and Marie Carrau: You, and each of you, are hereby notified that the above named petitioners will, on Monday, the 25th day of April, 1904, at twelve o'clock M., upon the coming in of the Supreme Court of the United States, upon their verified petition and copy of the entire record in this case, submit to the Supreme Court of the United States, in its court room at the capitol in the City of Washington, District of Columbia, their motion and petition for an order granting a writ of certiorari in the above entitled case, directed to the United States Circuit Court of Appeals for the Ninth Circuit, requiring said court to certify to said Supreme Court of the United States the entire record in cause numbered 925, lately pending in the said Circuit Court of Appeals, wherein these petitioners are appellees and Marie Carrau is appellant, a copy of which motion and of the petition for the writ of certiorari and of the brief in support thereof are herewith delivered to you.

March 25th, 1904.

JAMES B. HOWE.
Counsel for Petitioners.

SAMUEL H. PILES,
GEORGE DONWORTH,
CHARLES H. FARRELL.
Of Counsel.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1903

HANNAH O'CALLAGHAN and EDWARD CORCORAN, *Petitioners,* vs. TERENCE O'BRIEN, as Administrator of the Estate of John Sullivan, deceased, and MARIE CARRAU, *Respondents.*	No. 593

Motion for Writ of Certiorari.

Now come Hannah O'Callaghan and Edward Corcoran, by the undersigned, their counsel, and move this honorable court that it shall, by a writ of certiorari directed to the honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit, require said Judges of said court to cause to be certified to this court, for its review and determination, a certain cause, in said Court of Appeals lately pending, wherein the said Hannah O'Callaghan and Edward Corcoran were appellees and Marie Carrau was appellant, numbered in said court 925, and to that end they now tender herewith their petition and brief, with a certified copy of the entire record in said cause in said Circuit Court of Appeals.

JAMES B. HOWE.
Counsel for Petitioners.

SAMUEL H. PILES,
GEORGE DONWORTH,
CHARLES H. FARRELL.
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1903.

HANNAH O'CALLAGHAN and EDWARD CORCORAN, *Petitioners*, v. TERENCE O'BRIEN, as Administrator of the Estate of John Sullivan, deceased, and MARIE CARRAU, *Respondents.*	No. 593

The questions presented in this suit on the application for the writ of certiorari are the following:

I.

Did the Circuit Court of the United States for the District of Washington have jurisdiction of a suit, by two heirs at law and next of kin of a person who resided and died in the State of Washington, intestate, leaving there his entire estate, real and personal, to annul a fraudulent nuncupative will and a decree of a court of the state probating the same, procured by fraud, based entirely on perjured testimony and manufactured evidence, regular on its face, but without jurisdiction having been acquired, under which alleged will and its fraudulent probate a

stranger claims the entire estate of the decedent, where the amount involved is sufficient and the requisite diversity of citizenship for jurisdictional purposes exists, and when by the law of the state, customary and statutory, a proceeding between the same parties for the same relief can be maintained in a court of the state exercising general jurisdiction?

The Circuit Court held that it did have jurisdiction of such a suit, and rendered a decree upon the merits in favor of the petitioners. The Circuit Court of Appeals for the Ninth Circuit held that the Circuit Court did not have jurisdiction, and reversed the decree of the Circuit Court for want of jurisdiction over the subject matter of the suit, and directed the dismissal of the bill.

When a proceeding inter partes can be maintained in a state court, by whatever name the state court may be called, for the annulment of a will and its probate, a suit for the same relief may be maintained in the Circuit Court of the United States for the same state, if the other jurisdictional requisites exist.

The Circuit Court of Appeals for the Ninth Circuit, in an opinion delivered by Judge Knowles and concurred in by Mr. Justice McKenna, then Circuit Judge, said, in the case of

Richardson v. Green, 61 Fed. 423, 428:

"It should be observed also that when it is customary for such state courts to hear and determine such equitable suits a United States Court, under proper conditions, may hear them. *It is not necessary that a statute should exist authorizing the same.* The suit in the county court of Oregon in such matters is not authorized directly by any statute, but is a customary exercise of jurisdiction.* * * *

In the Broderick will case *it was admitted* if a state by statute authorized the bringing of a suit to declare a will void in its courts of law or equity, the same could be maintained in a proper case in a Federal court."

Again in the same opinion, the court said:

"Here it will be seen that if a suit is essentially a suit of a *civil nature, for equitable relief*, and it is customary to prosecute the same in *any* state court where the action arose, whether the same is a county court *or a probate court* or a District or Circuit Court, the proper Federal Court will have concurrent jurisdiction of the same with such state courts, where the amount is sufficient and the parties are citizens of different states as prescribed by the United States statutes."

In the concurring opinion, Judge McKenna, at page 435, said:

"A suit, however, may be maintained in the county court to declare the will void and revoke its probate. Clark's Heirs v. Ellis, 9 Or. 132, and cases supra. The nature of this suit is not precisely defined by the decisions, but it is certainly *inter partes*, and seems to be within the doctrine declared in Ellis v. Davis, 109 U. S. 496, 497; 3 Sup. Ct. 327. This *remedy* existing in the Oregon courts, it could be exercised by the United States Circuit Court."

The Circuit Court of Appeals therefore affirmed the decree of the Circuit Court for the District of Oregon, adjudging, in a suit brought by the heirs of a decedent, that an alleged will was forged and its probate fraudulently obtained, and enjoining the persons claiming thereunder from setting up any title to the estate of the deceased under the will and its probate.

The defendants applied to the Supreme Court for a writ of *certiorari*, upon the single ground that there was no law in the State of Oregon authorizing the maintenance of a suit in the courts of the state to annul a will and its probate; that a proceeding to annul a will and its probate was in effect one requiring the re-probate of the will; that it could be entertained by the county court only in the exercise of probate jurisdiction, and that for that reason jurisdiction did not exist in the Circuit Court of the United States for the District of Oregon to entertain a

suit for the annulment of a will and its probate. (Petition for writ of certiorari in Richardson v. Green, p. 4). Counsel for the petitioners in that case said, at page 1 of their brief:

"*The Circuit Court of the United States for the District of Oregon is without jurisdiction to decree a will invalid and cancel the same, none of the courts of the State of Oregon having jurisdiction to entertain a suit between parties for such relief.*"

The application for the writ of certiorari was denied by this court.

Richardson v. Green, 159 U. S. 264.

The denial of the writ of certiorari where the question sought to be reviewed was the jurisdiction of the Circuit Court of the United States to entertain the suit, must be taken as an affirmance by this court of the jurisdiction of that court.

This is the view which has always been taken of that case.

In Wart v. Wart, 117 Fed. 766,

the court, in following Richardson v. Green as establishing the jurisdiction of the Circuit Courts of the United States to entertain such suit, said:—

"In Richardson v. Green, 9 C. C. A. 565, 61 Fed. 423, this question is discussed at length, the conclusion reached being that under the laws of Oregon a proceeding to contest the validity of a will could be instituted after the probate thereof, and that if the adversary parties were citizens of different states and the amount involved was sufficient to meet the requirements of the judiciary act, a court of the United States could take jurisdiction over such a controversy. *An application was made to the Supreme Court for the purpose of bringing this case by means of a writ of certiorari before that court, but the application was denied. Richardson v. Green*, 159 *U. S.* 264, 15 *Sup. Ct.* 1042, 40 *L. Ed.* 142. *The denial of the writ when the question involved was that of jurisdiction,*

must be taken to be in effect an approval of the ruling of the Court of Appeals."

The court, therefore, held that the *Statutory right* given by section 3296 of the Code of Iowa to contest a will and its probate, was a right enforceable in the courts of the United States when the other jurisdictional requisites existed. The court said:—

"*A proceeding thus brought to contest the validity of a will presents a controversy between adversary parties, of which a court of the United States may take jurisdiction, provided the requisite amount is involved and a diversity of citizenship exists between the litigant parties.*"

In *Williams v. Crabb*, 117 Fed. 193.

the Circuit Court of Appeals for the Seventh Circuit, in asserting the jurisdiction of the Circuit Court to entertain a suit to set aside a will and its probate, said in following the decision in Richardson v. Green:

"*It is well settled that rights and remedies, legal or equitable provided by the statutes of the states to be pursued in the state courts may be enforced and administered in the Federal Courts*, and that the terms 'law' and 'equity' as used in the Constitution, although intended to mark a distinction between the two systems of jurisprudence as known and practiced at the time of its adoption, do not restrict the jurisdiction conferred by it to the very rights and remedies then recognized and employed, but embrace as well *not only rights newly created by the statutes of the states, but new forms of remedies to be administered in the courts of the United States according to the nature of the case. A state cannot, by its legislature, confer a substantive right or remedy in the way of a suit inter partes, upon its own citizens, that will not be available to the citizens of the other states; nor can it by any device restrict such right or remedy thus made available to enforcement in its own courts, the conditions of citizenship being such that they would otherwise be enforceable in the Federal Courts.* By any other view it would be in the power of a state by legislation to deprive citizens of other states either of the new right or remedy given by the state

statute, or of the forum granted by the Federal Constitution and laws. The citizen of another state cannot be compelled to make such an election, or to accept a remedy upon condition that he forego the constitutional forum to which he would otherwise be entitled."

Certiorari was applied for and denied in this case.

Crabb v. Williams, 187 U. S. 645.

In *Sawyer v. White*, 122 Fed. 223,

the Circuit Court of Appeals for the Eighth Circuit had before it the question of the jurisdiction of the Circuit Court to set aside a will and its probate on the ground that the execution of the will had been procured by undue influence. The court said:

"The action to contest the validity of this will *is a statutory proceeding*, under sections 4622, 4623, 1 Rev. St. Mo. 1899, p. 1102, which provide that any person interested in the probate of any will may contest its validity by a petition to the Circuit Court of the state, filed within five years after the will is probated. * * *

As the parties to this action were citizens of different states the Federal Court had jurisdiction to hear and determine this issue under the familiar rule that rights created and remedies provided by the statutes of a state to be pursued in the state court may be enforced and administered in the national courts either at law, in equity or in admiralty, as the nature of the rights or remedies may require. Darragh v. H. Wetter Mfg. Co., 78 Fed. 7, 14, 23, C. C. A. 609, 616; Gaines v. Fuentes, 92 U. S. 10, 20, 23, L. Ed. 524; Richardson v. Green, 9 C. C. A. 565, 571, 578, 61 Fed. 423, 429, 435; Brodhead v. Shoemaker (C. C.) 44 Fed. 518, 11 L. R. A. 567; in re Stutsman County (C. C.) 88 Fed. 337, 341; Ellis v. Davis, 109 U. S. 485, 497, 3 Sup. Ct. 327, 27 L. Ed. 1006; Railway Co. v. Whitton, 13 Wall. 270, 278, 287, 20 L. Ed. 571; Cummings v. Bank, 101 U. S. 153, 157, 25 L. Ed. 903; Davis v. Gray, 16 Wall. 203, 221, 21 L. Ed. 447; Broderick's Will, 21 Wall. 503, 520, 22 L. Ed. 599; Gormley v. Clark, 134 U. S. 338, 348, 10 Sup. Ct. 554, 33 L. Ed. 909; Cowley v. Railroad Co., 159 U. S. 569, 582, 16 Sup. Ct. 127, 40

L. Ed. 263; National Surety Co. v. State Bank of Humboldt (C. C. A.) 120 Fed. 593."

It is clear that the courts of the United States, other than the present Circuit Court of Appeals for the Ninth Circuit, understood when they followed the decision in Richardson v. Green, 61 Fed. 423, that that decision held that when a proceeding could be maintained in the courts of a State to annul a will and its probate, a suit to enforce the same rights could be maintained in the Circuit Court of the United States sitting in such State, and that it was immaterial whether the right to maintain such a proceeding in the courts of the State is created by *a customary exercise of jurisdiction, or by statute*. This is certain, because the jurisdiction upheld in Wart v. Wart, 117 Fed. 766, was founded upon Section 3296 of the Code of Iowa; in Sawyer v. White, 122 Fed. 223, the jurisdiction upheld was founded upon sections 4622, 4623, 1 Rev. St. Mo. 1899, p. 1102; and in Williams v. Crabb the jurisdiction was founded upon section 7 of chapter 148, Rev. St. of Ill.

In *Richardson v. Green*, 61 Fed. 423,

the claim was made that the Circuit Court of the United States for the District of Oregon had no jurisdiction to entertain such a suit, *because there was no statute in Oregon authorizing a court of the state to entertain such a suit*. At page 428 the court said:

"It is not *necessary* that a statute should exist authorizing the same. * * * In the Broderick Will case *it was admitted* if a *state statute authorized* the bringing of a suit to declare a will void in its courts of law or equity, the same could be maintained in a proper case in the Federal Court."

It was *conceded* that if there *was a statute* of the state authorizing such a suit, then the Circuit Court of the United States had concurrent jurisdiction with the courts of the state. It was held by the court that if it was customary for the courts of the state to entertain such

suits, then, even if there was no statute, the Circuit Court of the United States had *concurrent jurisdiction.*

In the case at bar the Circuit Court of Appeals holds that *because there is a statute* which authorizes a proceeding *inter partes* in the Superior Courts of the State of Washington exercising general jurisdiction, the Circuit Court of the United States for the District of Washington is *excluded from exercising concurrent jurisdiction with the state court.*

In Oregon the only court of the State having jurisdiction to entertain a contest of a will admitted to probate was a county court.

It is important, therefore, to determine the exact jurisdiction of the county court of Oregon.

"The county court shall have the *jurisdiction pertaining to probate courts* and Boards of County Commissioners, and such other powers and duties *and such civil jurisdiction, not exceeding the amount of value of* $500.00, and such criminal jurisdiction not extending to death or imprisonment in the penitentiary, as may be prescribed by law."

Article 7, Section 12, Constitution of Oregon.

"The county court is created by the organic law of the state (Art. 7 Const.), and its organization is provided for *and its jurisdiction limited and defined by such organic law* and the provisions of this title * * *"

Sec. 893 Hill's Annotated Laws of Oregon.
Sec. 867 Deady's General Laws of Oregon.

"The county court has jurisdiction, but not exclusive, of *actions at law* and all proceedings therein and connected therewith, where the claim or subject of the controversy *does not exceed the value of five hundred dollars* * * *"

Sec. 894 Hill; 868 Deady.

"The county court *has exclusive jurisdiction in the first instance pertaining to a court of probate*, that is,

1. *To take proof of wills.*

2. To grant *and revoke letters testamentary, of administration* or of guardianship. * * *"

Sec. 895, Hill; 869 Deady.

It thus appears that not only was there no grant to the county court of Oregon of equity jurisdiction, but all civil jurisdiction granted to the county court, outside of its probate jurisdiction, was expressly limited to five hundred dollars, and that jurisdiction was only conceded to it in actions at law. It is plain, therefore, that the authority for upholding the jurisdiction of the Circuit Court of the United States for the District of Oregon in a suit in equity, in the case of Richardson v. Green, was not based upon the proposition that the county court could entertain a suit either at law or in equity to annul a will and its probate. *The authority for upholding the jurisdiction of the Circuit Court in that case rested solely on the ground that the proceeding was inter partes.* This clearly appears from the cases cited by Judge McKenna to establish the character of the proceeding customarily instituted in the county courts of Oregon.

In Heirs of Clark v. Ellis, 9 Ore. 128,

the Supreme Court of Oregon said:

"The chief objection made upon the argument of the demurrer was that the county court had no jurisdiction of the subject matter, that the jurisdiction to annul wills *is not a matter pertaining to probate*, and is not vested in the county court either by the Constitution or by statute, and that original jurisdiction of such causes belongs to the Circuit Court. * * * The jurisdiction of the county court in a proper proceeding to set aside a will and to revoke letters testamentary, is not questioned. * * * *The re-probate* required when the validity of the will is attacked, the issue formed in every such proceeding of which the party propounding the will has the *onus probandi, is a subject matter of the same jurisdiction as the probate of a will of which the county court has the*

exclusive jurisdiction in the first instance under the statute above cited."

We now ask the attention of the court to some of the decisions upholding the jurisdiction of the Circuit Court of the United States in this suit.

Broderick's Will, 21 Wall. 503, (Kieley v. McGlynn).

This court dismissed a bill filed in the Circuit Court of the United States for the District of California, instituted to set aside a will and its probate. The statutory time for attacking the will and its probate in the probate court had elapsed long prior to the institution of the suit. No proceeding could then have been instituted in the probate court to annul the will and its probate, and this court held that none could be instituted in a Circuit Court of the United States, because none could be instituted in a court of the state. It is perfectly clear from the opinion that had there been no question of the statute of limitations, and had the statute of 1862 of California been in force at the time of the probating of the will, which authorized the District Courts of California to entertain proceedings to set aside wills and their probate on the ground of fraud, the jurisdiction of the Circuit Court of the United States would have been sustained. That such is the case clearly appears from the following language of the opinion:

"The statute of 1862 has been referred to, which gives to the District Courts of California power to set aside a will obtained by fraud or undue influence, or a forged will, and any probate obtained by fraud, concealment or perjury. Whilst it is true that alterations in the jurisdiction of the state courts cannot affect the equitable jurisdiction of the Circuit Courts of the United States so long as the equitable rights themselves remain, *yet an enlargement of equitable rights may be administered by the Circuit Courts as well as by the courts of the state. And this is probably a case in which an enlargement of equitable*

rights is effected, although presented in the form of a remedial proceeding. Indeed, much of *equitable jurisdiction* consists of better and more effective *remedies* for attaining the rights of parties. But the statute referred to cannot affect this suit, inasmuch as the statute of limitations would still apply in full force, and would present a perfect bar to the suit."

Gaines v. Fuentes, 92 U. S. 10.

This court having before it the question whether a Circuit Court of the United States sitting in equity in the State of Louisiana had jurisdiction to entertain a suit to annul a forged will and its fraudulent probate, said:

"The suit in the parish court is not a proceeding to establish a will, but to annul it as a muniment of title, and to limit the operation of the decree admitting it to probate. *It is in all essential particulars a suit for equitable relief*—to cancel an instrument alleged to be void, and to restrain the enforcement of a decree alleged to have been obtained upon false and insufficient testimony. *There are no separate equity courts in Louisiana, and suits for special relief of the nature here sought are not there designated suits in equity, but they are none the less essentially such suits, and if by the law obtaining in the state, customary or statutory, they can be maintained in a state court, whatever designation that court may bear, we think they may be maintained by original process in a Federal court, where the parties are on the one side citizens of Louisiana and on the other citizens of other states.*"

Ellis v. Davis, 109 U. S. 485, 496.

"Where provision is made by the laws of a state, as is the case in many, for trying the question of the validity of a will already admitted to probate by a litigation between parties in which that is the sole question, with the effect, if the judgment shall be in the negative, of rendering the probate void for all purposes as between the parties and those in privity with them, it may be that the courts of the United States have jurisdiction under existing provisions of law, to administer the remedy and to establish the right in a case where the controversy

is wholly between citizens of different states. The judicial power of the United States extends, by the terms of the Constitution, 'to controversies between citizens of different states,' and on the supposition, which is not admitted, that this embraces only such as arise in cases 'in law and equity,' it does not necessarily exclude those which may involve the exercise of jurisdiction in reference to the proof of validity of wills."

Byers v. McAuley, 149 U. S. 608.

A suit was instituted by persons claiming to be the heirs at law and next of kin of a decedent, against the administrator of the estate with the will annexed. It was claimed by the complainants that one Mary McAuley left an instrument in writing in the following words:

"By request of my dear brother, my house on Duquesne Way is to be sold at my death and the proceeds to be divided between the Home of the Friendless and the Home for Protestant Destitute Women."

This instrument had been admitted to probate as the will of Mary McAuley, and letters of administration with the will annexed had been issued to one Byers. Byers proceeded with the administration of the estate until it was ready for distribution. The day before the hearing of the application for distribution a bill was filed in the Circuit Court of the United States for the Western District of Pennsylvania, by citizens of states other than Pennsylvania. The bill set forth the death of Mary McAuley, that there were two classes of claimants to the estate, first and second cousins, that the so-called will was null and void, and that there was a large amount of personal estate in the hands of the administrator. The prayer was that the will and the probate be declared void and of no effect, that the administrator be enjoined from collecting the rents, that he be ordered to make an account of the assets, and that the assets be distributed among the complainants and all parties legally entitled thereto. The administrator filed a plea setting up the proceedings

in the Orphans' Court. The plea was overruled. The Circuit Court entered a decree in accordance with the prayer of the bill. This court reversed so much of the decree of the Circuit Court as undertook to determine the rights of parties, as between themselves, who were citizens of the same state, but affirmed so much of the decree of the Circuit Court as adjudicated the rights of persons possessing the requisite diversity of citizenship. The court held that complainants had no interest in the real estate mentioned in the instrument which had been probated as the will of Mary McAuley. This holding, however, was based upon the ground that the instrument, though void as a will, was valid as a declaration of trust.

If the decision of the Court of Appeals in the case at bar is correct, then this court, in the case of Byers v. McAuley, would have ordered that cause remanded and dismissed. It would not have affirmed so much of the decree of the Circuit Court as adjudicated the rights of parties before the court who possessed the requisite diversity of citizenship.

Cowley v. Northern Pacific Railroad Company, 159 U. S. 569, 582.

A judgment had been entered upon a stipulation made by the attorneys of appellant. Thereafter, without taking any proceeding in the original suit, appellant instituted an original proceeding in the District Court of the Territory of Washington to set aside the judgment in the former case, on the ground of fraud. The proceeding begun in the territorial court was afterwards proceeded with in the Superior Court of the State of Washington for Spokane County, and then removed to the Circuit Court of the United States, which entered a decree dismissing it. The Circuit Court held that appellant should have applied to the state court by petition or motion in the original case, and should not have brought an independent suit; that after the case had been removed from the

state court to the Circuit Court of the United States it was treated as a suit in equity, and that a court of the United States sitting in equity could not afford appellant any relief. This court, in reversing the decree of the Circuit Court, said:

"Although the *statute of a state* or territory may not restrict or limit the equitable jurisdiction of the Federal Courts, and may not directly enlarge such jurisdiction, *it may establish new rights or privileges* which the *Federal Courts may enforce on their equity* or admiralty side, precisely as they may enforce a new right of action given by statute on their common law side." (Citing Broderick's Will, 21 Wall. 503).

Bardon v. Land & River Improvement Company, 157 U. S. 327.

"We remarked in Gormley v. Clark, 134 U. S. 338, 348, that while the rule was well settled that remedies in the courts of the United States at common law or in equity, according to the essential character of the case, are uncontrolled in that particular by the practice of the state courts, yet an enlargement of equitable rights by state statutes may be administered by the Circuit Courts of the United States as well as by the courts of the state, *and when the case is one of a remedial proceeding, essentially of an equitable character, there can be no objection to the exercise of the jurisdiction.* Kieley v. McGlynn, 21 Wall. 503, 520." (Broderick's Case).

Smythe v. Ames, 169 U. S. 466, 517.

"A party, by going into a National Court, does not, this court has said, lose any right or appropriate remedy of which he might have availed himself in the state courts of the same locality; that the wise policy of the Constitution gives him a choice of tribunals."

Darragh v. Wetter Mfg. Co., 78 Fed. 7, 14.

"Rights created or provided by the statutes of the states to be pursued in the state courts, may be enforced and administered in the Federal Courts, either at law,

in equity or in admiralty, as the nature of the new rights may require."

Sheffield Furnace Co. v. Witherow, 149 U. S. 574, 579.

"It may well be affirmed that a state, by prescribing an action at law to enforce even statutory rights, cannot oust a Federal Court sitting in equity of its jurisdiction to enforce such rights, provided they are of an equitable nature."

Leighton v. Young, 52 Fed. 439, 442.

"Where a state statute creates a right and prescribes a mode of proceeding to enforce it in the state courts, the courts of the United States in that state will enforce the right, but not always in the mode prescribed for enforcing it in the state courts."

It being clear that whenever a state statute creates an equitable right the Circuit Courts of the United States will have jurisdiction in equity to enforce that right, the question is, has the State of Washington provided an equitable right which can be enforced in the courts of that state for the annulment of a will and its probate?

In Broderick's case, *supra*.,

this court, speaking of the right of action provided by the act of 1862 of California, for the annulment of a will, said:

"This is probably a case in which an enlargement of *equitable rights is effected, although presented in the form of a remedial proceeding.* Indeed, much of equitable jurisdiction consists of better and more effective remedies for attaining the rights of parties."

Gaines v. Fuentes, *supra*.

Suits to annul and cancel wills on the ground of fraud are not in Louisiana designated *suits in equity*, but this court in that case said "*but they are none the less essentially such suits.*"

The statute of Washington providing for the contest of a will is as follows:

"If any person interested in any will shall appear within one year after the probate or rejection thereof, and by petition to the superior court having jurisdiction contest the validity of said will, or pray to have the will proven which has been rejected, he shall file a petition containing his objections and exceptions to said will, or to the rejection thereof. Issues shall be made up, tried and determined in said court respecting the competency of the deceased to make last will and testament, or respecting the execution by the deceased of such last will and testament under restraint or undue influence or fraudulent representations, or for any other cause affecting the validity of such will."

Pierce's Washington Code, sec. 2395. (Ball. Code, sec. 6110).

"Upon the filing of the petition referred to in the next preceding section a citation shall be issued to the executors who have taken upon them the execution of the will, or to the administrators with the will annexed, and to all legatees named in the will residing in the territory (state) or to their guardians if any of them are minors, or their personal representatives if any of them are dead, requiring them to appear before the court on a day therein specified, to show cause why the petition should not be granted."

Pierce's Washington Code, sec. 2396. (Ball. Code, sec. 6111).

These sections of the statute create an equitable right in the form of a remedial proceeding. The Supreme Court of Washington has so decided.

"*Proceedings to contest a will are in their nature equitable, and trial by jury of issues of fact therein is not a matter of right.*"

Clayson v. Clayson, 26 Wash., 253.

In the State of Washington there are no probate courts. The Superior Courts of the state are courts of

general jurisdiction. Prior to statehood there were probate courts in the Territory of Washington. The constitution of the state (Sec. 10, Art. 27), provided for the continuance of probate courts until the second Monday of January, 1891, and that until that time the Superior Courts should exercise appellate and revisory jurisdiction over the probate courts.

In *Ball et al. vs. Clothier et al.*, decided by the Supreme Court of Washington March 12, 1904 (34 Wash. ——, not yet published), the court said:

"When the Constitution was adopted the Superior Court was vested with general jurisdiction, such as was exercised by the Territorial District Courts, and also with jurisdiction in probate matters, and the Probate Court as an independent tribunal was abolished."

In Filley v. Murphy, 30 Wash. 1, 5,

the Supreme Court of the State said:

"In this state we have no probate court, properly speaking, as distinguished from the court that entertains jurisdiction of other matters. * * * Matters pertaining to probate are referred to what is called 'probate procedure,' as distinguished from what is denominated 'civil' or 'criminal' procedure, but when the court sitting in a probate proceeding discovers in a petition the statement of facts which forms the basis of a controversy, we see no reason why it may not settle the issues thereunder, when an appearance has been made thereto, and then proceed to try it in a proper manner, as *any other civil cause*."

In Browder v. Phinney, 30 Wash. 74.

the court said, speaking of the Superior Court:

"It is not *a law court nor an equity court nor a probate court*, but it is all the time *the Superior Court of general jurisdiction*, empowered to try all these differently termed causes *under the title of a civil action;* and when it has once acquired jurisdiction of that *civil action*, it may proceed in an orderly way to determine equitable, legal or probate controversies."

In State ex rel. Stratton v. Tallman, 25 Wash. 295, the Supreme Court of the state, speaking of the same alleged will which is involved in this suit when the Attorney General of the state sought to attack its probate by motion, said:

"There is a plain procedure which is speedy and adequate, pointed out in Sec. 6110 Ball. Code, by which issues may be properly made up and tried and determined, respecting all questions affecting the regularity of the execution or of the validity of the will, *and the Superior Court entertaining such a suit* may fully protect such rights in the estate by such *stay of proceedings in the procedure in probate* as may be necessary or effective."

In Higgins v. Nethery, 30 Wash. 239,

the language of the court is:

"This *action* was begun by the appellants on February 15, 1901, to set aside the will upon the grounds that the deceased did not make it, that the same is void because the testator at the time the will was made was not of sound mind * * *. *On the trial the court found the facts against the contestants*, and dismissed the *action*. * * * When the cause was called for trial, appellants *(plaintiffs below)* requested the court to impose the burden of proof upon the *defendant*. * * * When the record shows, as it does in this case, that the court had jurisdiction, and all the facts appear to show *prima facie* a valid will, the order of the court admitting the will to probate must have some force. For that reason the burden must be upon the *plaintiffs* to show that the will was invalid by reason of the facts alleged, namely, that the testator did not execute the will, or that he was not of sound mind, or was under undue influence at the time he made it. The order admitting the will to probate is not *conclusive* of the facts necessary to support it, but when the facts appear of record they must be taken as true until the contrary is shown."

In Reformed Presbyterian Church v. McMillan, 31 Wash. 643,

the Supreme Court said:

"The Constitution does not make the Superior Courts probate courts. On the contrary, it vests the Superior Courts with jurisdiction 'of all matters of probate,' hence the court is not shorn of its general powers simply because the cause before it may be one *which was cognizable formerly in a court of probate.* It possesses in every case and at all times its powers as a court of superior and general jurisdiction, and among these is the power to hear and determine the question to whom a bequest made by a decedent rightfully belongs. *A statute, therefore, can neither add to nor take away the power, and it is immaterial to inquire whether or not one conferring such power is in existence.*"

These decisions of the Supreme Court of the State of Washington demonstrate that the proceeding to contest a will and its probate is a suit in a court of general jurisdiction.

In the opinion of the Court of Appeals in this suit the court said that the Supreme Court of the State, in denominating the proceeding to contest a will, provided by the state statute, a "*suit*," manifestly used an inapt expression (R. p. 1445).

In Weston v. City Council of Charleston, 2 Pet. 449, this court, speaking by Chief Justice Marshall, in defining the word "suit," said:

"The term is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice by which an individual pursues that remedy in a court of justice which the law affords him. *The modes of proceeding may be various, but if a right is litigated between parties in a court of justice, the proceeding by which the decision of the court is sought is a suit.*"

It is respectfully submitted that it would be hard to provide a proceeding which would have more of the characteristics of a suit than the proceeding provided by the statute of Washington, and in determining that it was a "suit" the Supreme Court of the state not only followed the rule announced by this court, but as the highest author-

ity in the state announced a rule for the courts of the state in construing a statute of the state. The Supreme Court of the state, in designating the proceeding a "suit," was not deciding that it was a "suit" over which the National Courts would have jurisdiction. It was only deciding in construing the State Statute that the proceeding was a "suit" to be entertained by the Superior Courts of the state in the exercise of their general jurisdiction. That determination is conclusive. As then this suit could be maintained in the courts of the state, it can be maintained in the Court of the United States sitting in the same state, the other jurisdictional requirements existing.

In Woerner on Administration (2nd Ed.), Sec. 156, p. 357,

the law is thus stated:

"While the probate of a will *ex parte* is *in rem*, and, not being between parties, cannot be removed to the Federal Courts, yet, where such will is contested in pursuance of statutory provisions, and becomes a suit *inter partes*, residing in different states, the Federal Courts take jurisdiction as they would in any other controversy between the parties."

Brodhead, v. Shoemaker, 44 Fed. 518.
Everhart v. Everhart, 34 Fed. 82.
Kirby v. R. R. Co., 106 Fed. 551.

If, in Richardson v. Green, the Circuit Court of the United States of the District of Oregon had jurisdiction in equity of a suit to annul a will and its probate, although the only State Court in which a contest might be instituted had no jurisdiction in equity, and none at law where the amount involved exceeded five hundred dollars, then the jurisdiction of the Circuit Court in that case was founded upon the proposition that an equitable right had been created by a state custom, and a Court of the United States could enforce that right in equity, regardless of the remedy existing in the Courts of the state, and regardless of the

character of the Court of the state in which it might be enforced, provided the right to be enforced was one which was to be enforced *inter partes*.

Ex parte McNeil, 13 Wall. 236, 243.

"A state law cannot give jurisdiction to any Federal Court, but that is not a question in this case. A state law may give a substantial right of such a character that where there is no impediment arising from the residence of the parties, the right may be enforced in the proper federal tribunal, whether it be a court of equity, of admiralty, or of common law. The statute in such cases does not *confer the jurisdiction. That exists already, and it is invoked to give effect to the right by applying the appropriate remedy.* This principle may be laid down as axiomatic in our national jurisprudence. A party forfeits nothing by going into a federal tribunal."

If the customary exercise of jurisdiction by a county court in Oregon in the exercise of probate jurisdiction over a proceeding *inter partes* to annul a will and its probate, was sufficient to authorize the Circuit Court of the United States in Oregon, sitting in equity, to take jurisdiction of a suit to annul a will and its probate, how can it be claimed that the customary and statutory exercise of jurisdiction by the Superior Courts of the State of Washington over like proceedings can deprive the Circuit Courts of the United States sitting in Washington of jurisdiction to entertain a similar suit?

If the statute of Washington and the decisions of the Supreme Court of the state do not make it clear that the contest of a will and its probate is a proceeding *inter partes*, and is a suit of such a character as authorizes a Circuit Court of the United States to take jurisdiction when instituted by parties possessing the requisite diversity of citizenship, and where the amount involved is sufficient, we are unable to understand upon what possible theory the decision in

Richardson v. Green, 61 Fed. 423,

could have been rendered and approved by this court.

We submit that it is not competent for the State of Washington to provide a remedy by which a will, after its probate, can be attacked by a proceeding *inter partes* in a court of general jurisdiction, that the procedure should be of an equitable character, that it should be a suit, a civil action, but that a party claiming such remedy must resort exclusively to Courts of the state or give up his right to redress, although by reason of his citizenship

> "the wise policy of the Constitution gives him a choice of tribunals."

We submit that no case can be found denying the jurisdiction of a Circuit Court of the United States over a suit to annul a will and its probate, instituted by parties possessing the requisite diversity of citizenship, where the amount involved is sufficient for jurisdictional purposes, when by the law of the state where the Circuit Court of the United States is held, a proceeding *inter partes*, other than by an appeal, can be maintained in a State Court of general jurisdiction to obtain the same relief.

II.

The Circuit Court of the United States for the District of Washington, under the allegations of the bill, had jurisdiction in equity to entertain the suit to set aside the will on the ground of fraud, and the decree probating the same because procured by fraud, and which, if allowed to stand, would constitute muniments of title, if the will conveyed, as claimed by Marie Carran, realty as well as personalty.

In Cowley v. Northern Pacific R. R. Co., 159 U. S. 569, 580,

this court distinguished the cases of

Gaines vs. Fuentes, 92 U. S., 10,

and

Barrow v. Hunton, 99 U. S., 80,

and said:

"The distinction between the two cases above cited is that in the latter case the judgment was impeached for a matter of form, and in the former case for the *falsity and insufficiency of the testimony* upon which the will was admitted to probate; in other words, *for a fraud connected with the probating of the will.*'

In Marshall v. Holmes, 141 U. S. 590,

this court cited Gaines v. Fuentes, Barrow v. Hunton, Johnson v. Waters, *supra.*, and Arrowsmith v. Gleason, 129 U. S. 86, and said:

"These authorities would seem *to place beyond question the jurisdiction of the Circuit Court to take cognizance of the present suit, which is none the less an original, independent suit because it relates to judgments obtained in the court of another jurisdiction.* While it cannot require the state court itself to set aside or vacate the judgments in question, it may, as between the parties before it, if the facts justify such relief, adjudge that Mayer shall not enjoy the inequitable advantage obtained by his judgments. A decree to that effect would operate directly upon him, and would not contravene that provision of the statute prohibiting a court of the United States from granting a writ of injunction to stay proceedings in the state court. It would simply take from him the benefit of judgments obtained by fraud."

That a court of the United States has jurisdiction of a suit to enjoin a person from availing himself of a judgment obtained by fraud, based upon false evidence and rendered *ex parte*, would seem to be perfectly clear.

Howard v. Cordova, 177 U. S. 609.
Graver v. Faurot, 76 Fed. 257.
Arrowsmith v. Gleason, 129 U. S. 86.
Marshall v. Holmes, 141 U. S. 590.

Davenport v. Moore, 74 Fed. 945.
Johnson v. Waters, 111 U. S. 640.

Did the Circuit Court of the United States for the District of Washington have jurisdiction of a suit between the parties to the record to construe the alleged nuncupative will and determine it invalid on its face, on the ground that the section of the act of the Territory of Washington under which its validity is asserted is void because in conflict with section 6 of the act of Congress entitled "An Act to establish the Territorial Government of Washington"?

The law of Washington, approved March 20, 1895, (Laws of Washington, 1895, p. 197), is as follows:

"Section 1. When a person dies seized of lands, tenements or hereditaments, or any right thereto, or entitled to any interest therein in fee or for the life of another, *his title shall vest immediately in his heirs or devisees*, subject to his debts, family allowance, expenses of administration and any other charges for which such real estate is liable under existing laws. No administration of the estate of such decedent, and no decree of distribution or any other finding or order of any court shall be necessary in any case to vest such title in the heirs or devisees, but the same shall vest in the heirs or devisees instantly upon the death of such decedent; *provided, that no person shall be deemed a devisee until the will has been probated.* The title and right to possession of such lands, tenements or hereditaments so vested in such heirs or devisees, together with the rents, issues and profits thereof shall be good and valid against all persons claiming adversely to the claims of any such heirs, or devisees, excepting only the executor or administrator when appointed, and persons lawfully claiming under such executor or administrator; *and any one or more of such heirs or devisees, or their grantees, jointly or severally, may sue for and recover their respective shares or interests in any such lands, tenements or hereditaments, and the rents, issues and profits thereof, whether letters testamentary or of administration be granted or not, from any person except the executor or*

administrator, and those lawfully claiming under such executor or administrator."

In construing this law, the Supreme Court of Washington, in the case of

Griffin v. Warburton, 23 Wash. 231,

said:

"Under the statute as it now exists, the heirs upon the death of an ancestor become vested at once with the full property, subject only to the claims of the ancestor's creditors and the necessary costs and charges of administration. *They have the right of possession against all the world, except the right of the administrator while these claims are being adjusted and satisfied.* But the administrator's right to the possession of the property of an estate is temporary and limited to the purposes of administration. When the claims of creditors are paid or barred, and the costs and charges of administration are satisfied, the estate is for all practical purposes fully administered upon, the right of possession in the administrator terminates, and the right of the heirs to the residue of the estate in his hands becomes absolute. The heirs are then entitled to have this residue delivered over to them as their own property, under the law, and it is made the duty of the administrator by the statute to surrender the property to them. This duty they can enforce by obtaining a decree of the court directing its performance. As such a decree, however, neither creates their title nor their right of possession to the property, a distribution made without it cannot be invalid."

It is clear, therefore, that if the alleged will was invalid, these petitioners were the owners of the estate of the deceased, and the realty vested in them immediately. They could not, however, maintain ejectment against the administrator, for the statute protected his possession. They could not maintain ejectment against Marie Carrau, because she was not in possession. The administrator held the property in trust for the heirs. Marie Carrau asserted a claim to the property under the alleged will and its fraudulent decree of probate. A court

of equity was the only court which could afford petitioners any relief, by cancelling the alleged will and enjoining Marie Carrau from setting up any claim under it. The bill invoked the jurisdiction of the Circuit Court, if it should be found that the will was made, to determine that it was void upon its face because the estate bequeathed exceeded in value the sum of two hundred dollars. It is respectfully submitted that a Circuit Court of the United States sitting in equity has jurisdiction of a suit to construe a will and to determine it invalid, where the party instituting such suit has no adequate remedy at law.

Potter v. Couch, 141 U. S. 296.
Jones v. Habersham, 107 U. S. 174.
Ware v. Wisner, 50 Fed. 310.
Brigham v. Kenyon, 76 Fed. 30.
Sherman v. American Congregational Ass'n., 113 Fed. 609.
Waterfield v. Rice, 111 Fed. 625.
Handley v. Palmer, 103 Fed. 39.
Colton v. Colton, 127 U. S. 300.
Boman vs. Boman, 49 Fed 329

A nuncupative will, under the law of Washington, is invalid where the estate bequeathed exceeds two hundred dollars.

Section 6 of the Organic Act of the Territory of Washington, approved March 2, 1853, (U. S. Stats. at Large, Vol. 10, pp. 172, 175), is as follows:

"Section 6. * * * To avoid improper influences which may result from intermixing in one and the same act such things as have no proper relation to each other, *every law shall embrace but one object, and that shall be expressed in the title.*"

The Territorial Legislature, at its first session, in 1854, enacted a statute entitled:

"An Act establishing probate courts for the Territory of Washington."

Laws of 1854, Territory of Washington, p. 309.

At the same session the legislature enacted a statute entitled:

"An Act relating to Wills."

Laws of 1854, p. 312.

Section 23 of this act provides:

"No nuncupative will shall be good when the estate bequeathed *exceeds the value of two hundred dollars, nor* unless the same be proven by two witnesses. * * *"

No change was attempted to be made in the amount of an estate which could be bequeathed by nuncupative will, until November 11, 1873, when the legislature of the Territory, by an act approved on that date, entitled:

"An Act *defining the jurisdiction and practice* in the probate courts of Washington Territory,"

omitted the word "nor" after the words "two hundred dollars" and before the word "unless," and thereby, if the repeal was valid, removed the limitation on the amount of an estate which might be bequeathed by nuncupative will,

Laws of 1873, pp. 252, 259,

making the section read as follows:

"Section 33. No nuncupative will shall be good when the estate bequeathed exceeds the value of two hundred dollars, (———) unless the same be proved by two witnesses. * * *"

Section 33 of the act of March 11, 1873, was re-enacted by the Territorial Legislature by an act approved December 1, 1881, entitled:

"An Act *defining the jurisdiction and practice* in the probate courts of Washington Territory."

Pierce's Code of Washington, p. 355.

There is nothing in the title of the act of November 11, 1873, nor in the title of the act of December 1, 1881, relating in any manner to the subject of wills. The sec-

tion in the body of each of those acts, re-enacting section 23 of the act of 1854, but omitting the word "nor," and by such omission repealing the limitation imposed by section 23 of the act of 1854 upon the amount of an estate which might be bequeathed by nuncupative will, is in conflict with the provisions of section 6 of the Organic Act of the Territory of Washington, which required that every law of the territory—

"—shall embrace but one object, and that shall be expressed in the title."

By leaving the word "*nor*" after the words "two hundred dollars" and before the word "unless," out of Section 33 of the act entitled "An act defining the jurisdiction and practice in the probate courts of Washington Territory," not only was the limitation upon the amount of an estate which might be bequeathed by nuncupative will, which had been imposed by Section 23 of the Act of 1854, removed, but when the estate did not exceed two hundred dollars the formalities required by 29 Stat. of Charles II. and by the Act of 1854 were entirely dispensed with. Could a legistor, hearing only the title of the act read, possibly contemplate that such a vital change in the law of wills was being made, in an act entitled "An Act defining the jurisdiction and practice in the probate courts of Washington Territory?" Would he not necessarily conclude upon hearing the title read that the bill was one to amend the Act of 1854, entitled "An Act establishing probate courts for the Territory of Washington," instead of "An Act relating to wills?" The vice in the act is that the title not only does not give notice that the legislature was dealing with the subject of wills, but it is actually misleading because it purports to deal only with the jurisdiction and practice of courts.

There has been no legislation relating to nuncupative wills since the Territory of Washington became a state.

That the title

"An Act *defining the jurisdiction and practice* in the probate courts of Washington Territory."

is not sufficiently broad to cover a provision repealing the limitation of two hundred dollars which had been imposed upon estates bequeathed by nuncupative wills, there is no doubt. There is in the title no indication that the legislature of the territory was legislating upon the subject of wills. Legislation in reference to that subject was therefore void, because the title of the act did not conform to the requirements of the organic law of the territory.

State v. Tieman, 73 Pac. Rep. 375; 32 Wash. 294.
State v. McDonald, 64 Pac. 912; 25 Wash. 122.
Sengfelder v. Hill, 21 Wash. 371.

In this case the court said:

"The title of the act is 'An Act to protect innocent purchasers of *community* real property,' which under section 19 of Article 2 of the state constitution *is too narrow to include within the terms of the act property held by a title other than that specially mentioned.*"

Warburton v. White, 18 Wash. 511.
Howlett v. Cheatham, 17 Wash. 626.
National Bank of Commerce v. Seattle Pickle Works, 15 Wash. 126.
Percival v. Cowychee Dist., 15 Wash. 480.

In Howard v. Schneider, 62 Pac. 435, 10 Kan. App. 137, the Supreme Court of Kansas held:

"Chapter 203, laws of 1891, entitled 'An Act to abolish survivorship in *joint tenancy*' is unconstitutional, in so far as it attempts to abolish survivorship in estates *in entirety*, said subject not being included in the title."

In State v. Bankers' & Merchants' Mutual Benefit Ass'n., 23 Kan. 501,

Mr. Justice Brewer, then upon the Supreme Bench of Kansas, said:

"The Constitution has said that the title must be an index to the law, and the courts may not sanction as a valid enactment any part of a statute to which the finger of the title does not point. If we should attempt to enlarge the title, we should defeat the very purpose of the constitutional prohibition, which was to make the title to a bill notice of all contemplated legislation."

Citizens' Savings Bank v. Auditor General, 82 N. W., 214 (Mich.); 123 Mich. 511.
State v. Board, 41 Pac. 145; 22 Nev. 399.
Van Houten v. People, 43 Pac. 137; 22 Colo. 53.
State ex rel. Cooper v. Springer, 46 Atl. 589 65 N. J. L. 161.

In this case the court said:

"To comply with the Constitution, the title of a proposed law must give reasonable intimation of the matters under consideration; and as the title must limit the enactment to matters within its scope, it follows that the legislation on which rests the present application is void."

Gray, Atty. Gen., v. Newark Co., 46 Atl. 606; 65 N. J. L. 51.
Walling v. Mayor, 44 Atl. 864; 64 N. J. L. 203.
Harris v. State, 36 S. E. 232; 113 Ga. 725.
Hayes v. Storms, 45 Atl. 809; 64 N. J. L. 514.
In re Brean, 14 Colo. 401.
Rex Lumber Co. v. Reed, 77 N. W. 572; 107 Iowa 111.
Frazier v. Georgia R. R. & Banking Co., 28 S. E. 662, 101 Ga. 77.
Folkner v. Dorland, 24 Atl. 403; 54 N. J. L. 409.
Brooks v. People, 24 Pac. 553; 14 Colo. 413.
Ragio v. State, 6 S. W. 401; 2 Pickle (Tenn.) 272.
Thomas v. Wabash Ry., 40 Fed. 126.
Case v. Loftus, 43 Fed. 839.
Crowther v. Fidelity Ins. Co., 85 Fed. 41.

In *People v. Congdon*, 43 N. W. 986, 77 Mich. 351, the body of the act provided for *articles of adoption*, and that the child adopted should be the *heir* of the persons adopting. The court said:

"The law is plainly in violation of the constitutional provision that the object of the act shall be expressed in its title. The title of this act as passed and adopted is, 'An Act to provide for the *changing the names of minor adopted children and of other persons*.'"

In State v. Hancock, 32 Atl. 689, 58 N. J. L. 139, the syllabus, which is by the court, is as follows:

"The title of an act being 'An Act to tax *intestates' estates*, gifts, *legacies* and collateral inheritance, in certain cases,' held, that the title did not express a purpose to tax *real estate devised*, and the provisions for that purpose were therefore invalid."

The Code of 1881 was not a re-enactment of former laws, but was a compilation of such laws as had theretofore been legally enacted, and of such laws as were enacted at the special session of the legislature in 1881.

Baer v. Choir, 7 Wash. 631, 637.
Gractz v. McKenzie, 3 Wash. 194, 197.
Northern Pacific R. R. Co. v. Ellison, 3 Wash. 225.

We have examined the original enrolled act in the office of the Secretary of State of the State of Washington, which was passed at the session of 1881, and approved December 1, 1881, entitled:

"An Act defining the jurisdiction and practice in the probate courts of Washington Territory."

Its sections begin with section 1297 and end with section 1686, of the Code of 1881. Its title is also set forth in Pierce's Washington Code at page 355. The law of Washington, therefore, upon the subject of nuncupative wills remains as enacted by the legislature of 1854. That legislature imposed a limitation of two hundred dollars

upon estates which might be bequeathed by nuncupative will.

The alleged nuncupative will under which Marie Carrau claims the entire estate asserts that the estate bequeathed is worth "many thousands of dollars." It is therefore void upon its face.

Stricker v. Oldenburg, 39 Iowa 653.
Pierce v. Pierce, 46 Ind. 86.

The Circuit Court of the United States certainly had jurisdiction of a suit instituted by aliens against Marie Carrau, a citizen of the State of Washington claiming under the alleged will, to construe the alleged will, to determine it invalid, and to enjoin her from making any claim under it.

IV.

Did the Circuit Court of the United States for the District of Washington have jurisdiction of a suit between the parties to construe the alleged nuncupative will and determine that it did not convey real estate, and that, therefore, even if valid, the decedent died intestate as to such real estate?

The authorities cited under proposition III clearly establish the jurisdiction of a court of the United States sitting in equity to construe a will.

In *Byers v. McAuley, supra*,

this court held that the instrument which had been probated by the Orphans' Court of Pennsylvania as a last will and testament, could not stand as a will, but that it was good as a declaration of trust.

The statute of Washington in reference to nuncupative wills did not create a right to make a nuncupative will. It simply required that nuncupative wills should be made with more formality than was required by the common law, and limited the amount of an estate which might be *bequeathed*. Until the Statutes of Wills (32 and 34

Henry VIII.) real estate could not be devised. The Statute of Wills required wills of lands to be in writing. Nuncupative wills were left as at common law, and they could dispose of personal property only. By the Statute of 29 Charles II. restrictions were imposed upon them. They were abolished in England by Act I. Vict., c. 26 (1837), except in case of soldiers in service and seamen at sea. In America they have generally been abolished, except in the case of soldiers in service and sailors at sea, or else greater restrictions have been imposed upon them and the amount which might be *bequeathed* limited to small sums. Washington has imposed great restrictions, limited the amount and allows only bequests.

A nuncupative will does not convey real estate.

In re Davis' Will, 79 N. W. Rep. 761; 103 Wis. 455.
Sadler v. Sadler, 60 Miss. 251.
McLeod v. Dell, 9 Fla. 451.
Smithdeal v. Smith, 64 N. C. 52.
Palmer v. Palmer, 2 Dana 390.
Page v. Page, 2 Rob. (Va.) 424.
Lewis v. Aylott, 45 Tex. 190.
Pierce v. Pierce, 46 Ind. 86.
Schouler on the Law of Wills, Sec. 362.
Moffett v. Moffett, 67 Texas 642.

Inasmuch as the bill invoked the jurisdiction of the Circuit Court to annul the alleged will and its probate, on the ground of fraud, alleging facts bringing the case within the decision in Marshall v. Holmes, *supra*, and inasmuch as the bill also invoked the jurisdiction of the court to construe the alleged will and to determine it invalid upon its face because there was no law authorizing the making of a nuncupative will where the estate bequeathed exceeded two hundred dollars, and also invoked the jurisdiction of the court if the will was made and was valid, to construe it and determine that real estate did not pass under it, there was a suit before the court of which it had

undoubted jurisdiction, and in that suit there arose a controversy as to the making of the will. Such being the case, the suit comes directly within the rule announced in Gaines v. Fuentes, *supra*.

Petitioners were compelled to resort to a court of equity in order to obtain the relief which they sought. The claim of the respondent was not that petitioners had a plain and adequate remedy at law, but it was that the Superior Court of the State of Washington for King County had exclusive jurisdiction of the subject matter of the controversy between the parties to the suit in the Circuit Court of the United States. A court of law could not enjoin the respondent Carrau from asserting title to the estate, which was the principal relief sought against her.

In *McConihay v. Wright*, 121 U. S. 202,

a suit was brought in the Circuit Court of the United States in equity to quiet the title of complainant to a tract of land in West Virginia. The West Virginia Code allowed an action of ejectment against one claiming title to or interest in land, although not in possession. It was claimed by the defendant that the West Virginia statute furnished a plain and adequate remedy at law, and therefore that a court of equity had no jurisdiction of the suit to quiet title. This court said, speaking of the existence of the statute:

"Admitting this to be so, it nevertheless cannot have the effect to oust the jurisdiction in equity of the courts of the United States as previously established."

The remedy at law, in order to exclude the exercise of equity jurisdiction, must be not only adequate, but as complete as that which can be afforded by a court of equity.

Rich v. Braxton, 158 U. S. 378.
Gormley v. Clark, 134 U. S. 338.
Allen v. Hanks, 136 U. S. 301, 310.
Tyler v. Savage, 143 U. S. 79, 95.

Kilbourne v. Sunderland, 130 U. S. 505, 514.
Boyce's Executors v. Grundy, 3 Pet. 210, 215.
Walla Walla v. Walla Walla Water Co., 172 U. S. 1, 12.
Hudson v. Randolph, 66 Fed. 217.
Waite v. O'Neil, 72 Fed. 356.
Bardon v. Land Co., 157 U. S. 330.
Smythe v. Ames, 169 U. S. 516.
Sheffield Furnace Co. v. Witherow, 149 U. S. 574, 579.

V.

Does the fact that certain claimants of the estate, whose claims are denied by both parties to the suit, and against whom no relief is asked or can be granted, are not joined as parties, and whose joinder would oust the court of jurisdiction, deprive the court of jurisdiction to determine the controversy between the parties actually before the court, who do possess the requisite diversity of citizenship?

The 47th rule in equity settles this question in the negative.

Fisher v. Shropshire, 147 U. S. 133.

All of the parties were before the court whom the statute of Washington required should be made parties to a suit to contest the will, namely, the petitioners as parties interested in the will, the administrator, and the alleged legatee named in the will, residing in the state. The statute of Washington does not, as does the statute of California, require that all of the heirs should be made parties, even if there were heirs other than these petitioners. In view of the fact, however, that the petitioners claim to be the only heirs of the deceased, and that the respondent Marie Carran claims that the deceased died without leaving any relatives, it would seem an idle form to make parties those who both petitioners and respondents say have no interest in the estate. In Byers v. McAuley, *supra*, this

court found no difficulty in determining the controversy between the parties to the suit who possessed the requisite diversity of citizenship, but reversed the decree as to other parties who did not possess the requisite diversity of citizenship. Under the allegations of the bill and answer, and especially in view of the evidence in the case, the persons other than the petitioners, who claimed to be heirs of the deceased, were neither indispensable nor proper parties. No relief was asked against them. They were not alleged to have any interest in the controversy.

In *Williams v. United States*, 138 U. S. 514,

certain lands in controversy had been certified to the State of Nevada. The state made a contract with appellant for the sale to him, he paying one-fifth of the purchase money at the date of the contract, and contracting to pay the balance in subsequent installments. The United States filed a bill in the Circuit Court for the District of Nevada against appellant alone. The scope of the allegation of the bill was that the lands were improperly certified to the state. The prayer of the bill was for the cancellation of the contract between appellant and the State of Nevada, and an adjudication that appellant had no interest or title in the lands, and that he be directed to surrender to the state for cancellation all contracts and agreements which he had with the state. The court said:

"The first contention of appellant is that this action could not be maintained, because the State of Nevada was not made party, it holding the legal title. * * * * With respect to the first contention, it cannot be doubted that the certification operated to transfer the legal title to the state (Frasher v. O'Connor, 115 U. S. 102), nor that the contract between the state and appellant passed to him the equitable title, the legal title being retained by the state simply as security for the unpaid part of the purchase money. *The proposition, therefore, is that where there are outstanding two interests or titles held by different parties, the real owner cannot proceed against either without joining the other; that only one action can be*

maintained to divest these parties of their separate titles, and that to that action both adverse holders must be parties. The proposition is not sound. A court of equity has jurisdiction to divest either one of the adverse holders of his title in a separate action. Doubtless the court has power, when a separate action is instituted against one, to require that the other party be brought into the suit, if it appears necessary to prevent wrong and injury to either party, and to thus fully determine the title in one action, but such right does not oust the court of jurisdiction of the separate action against either. It has jurisdiction of separate actions against each of the adverse holders, and there is no legal compulsion, as a matter of jurisdictional necessity, to the joinder of both parties as defendants in one action. There are special reasons why this rule should be recognized in this case. It may be that the Circuit Court would not have jurisdiction of an action against the state; that an action against a state on behalf of the United States can be maintainable only in this court, and that, when brought in this court, no other party than the state can be made defendant. We do not decide that these things are so, but suggest the difficulty which must have presented itself to the counsel for the government, and which justifies a separate suit against the holder of the equitable title."

In *Kerr v. Watts*, 6 Wheat. 550 this court said:

"*No one need be made a party complainant in whom there exists no interest, and no one party defendant from whom nothing is demanded. Watts rests his case upon the averment that all the interests once vested in O'Neill and the Scotts now center in himself, and provided he can recover the land now in possession of those actually made defendants, he is contented afterwards to meet the just claims of any others who are not made defendants. No rights will be affected by his recovery but those of the actual defendants and those claiming through them.*"

In the case at bar, these petitioners are entitled to relief against the defendants actually before the court, and are content afterwards to meet the claims of any others who are not made defendants. These petitioners say there are no others who should be made defendants. The respondent Carran says that there are no relatives of the de-

ceased. If the claim of these petitioners is true, there is no need to make the absent claimants parties. If the claim of the respondent Carrau is true, there is no need to make them parties. If persons other than those before the court had any rights in the estate, the decree in this suit would not affect them.

Elmendorf v. Taylor, 10 Wheat. 152.
Vattier v. Hinde, 7 Pet. 252, 263.
Storey v. Livingstone, 13 Pet. 359, 375.
Joy v. Wirts, Fed. Case 7554.
House v. Mullen, 22 Wall. 42.
Ry. Co. v. Stewart, 95 U. S. 284.
Dick v. Baleh, 8 Pet. 36.
Williams v. Gibbs, 17 How. 239.
U. S. v. Heudy, 54 Fed. 447.
Billings v. Aspen Mining Co., 51 Fed. 338.
Harrison v. Crau, Fed. Case 6146.
Union M. Co. v. Dauglery, 81 Fed. 73.
Smith v. Lee, 77 Fed. 779.
Hamilton v. Savannah R. R., 49 Fed. 412.
Society v. Hartland, Fed. Case 13155.

VI.

As stated in the petition for the writ of *certiorari*, in this suit an appeal has been allowed by the United States Circuit Court of Appeals to this court, and is now pending in this court, being docketed as No. 593, October Term, 1903.

The application for the writ of *certiorari* is made because there is doubt whether the decree of the United States Circuit Court of Appeals is final. If this court should hold that it has not jurisdiction of such appeal when the case is reached in the ordinary course of the business of this court, it would then be too late for these petitioners to apply for the writ.

Ayres v. Polsdorfer, 187 U. S. 585.

These petitioners have, therefore, applied for the writ promptly, so that if this court has not jurisdiction to review the decree of the United States Circuit Court of Appeals by way of appeal, such review may be had by the writ of *certiorari*, and they pray that the copy of the record heretofore filed on the appeal be taken and deemed a sufficient return to the writ of *certiorari*.

Security Trust Co. v. Dent, 187 U. S. 237.

The appeal presents the following questions:

1. Has the United States Circuit Court of Appeals jurisdiction of an appeal from a decree of the Circuit Court of the United States for the District of Washington, rendered on the merits in a case where the jurisdiction of the Circuit Court, which was in issue, was invoked both on the ground of diversity of citizenship and also on the ground that certain proceedings in the Superior Court of the State of Washington for King County were taken without jurisdiction, and deprived the petitioners of their property without due process of law, in contravention of the Fourteenth Amendment to the Constitution of the United States?

It is clear that if diversity of citizenship did not exist, and that the jurisdiction of the Circuit Court rested solely on the ground that the bill stated facts showing that the suit depended on the construction or application of the Constitution of the United States, the Circuit Court of Appeals had no jurisdiction of the appeal, and the sole remedy of the respondent (the appellant in the United States Circuit Court of Appeals) was to appeal to this court.

Union & Planters' Bank v. Memphis, 189 U. S. 71.
American Sugar Ref. Co. v. New Orleans, 181 U. S. 277.

It is equally clear that if the jurisdiction of the Circuit Court could be rested both on diversity of citizenship

and a federal question other than one involving the construction or application of the Constitution of the United States, then the Circuit Court of Appeals would have jurisdiction of an appeal from the Circuit Court, but its decision would not be final.

Northern Pacific R. R. Co. v. Soderberg, 188 U. S. 526.

Howard v. U. S. to the use of David Stewart, 184 U. S. 676.

If, however, a suit is one where jurisdiction of the Circuit Court is invoked because the construction or application of the Constitution of the United States is involved, then it is one which can be brought directly to this court from the Circuit Court, and the whole case is open upon such appeal.

Giles v. Harris, 189 U. S. 475.
Cummings v. Chicago, 188 U. S. 410.

This is so, although jurisdiction also exists because of diversity of citizenship

Davis & Farnum Co. v. Los Angeles, 189 U. S. 207.

The Circuit Court of Appeals for the Ninth Circuit, in *Wright v. McFarlane & Co.*, 122 Fed. 770,

dismissed an appeal for want of jurisdiction, and said, in commenting upon

Penn Mut. Life Ins. Co. v. Austin, 168 U. S. 685:

"It will be observed that in this case the jurisdiction of the Circuit Court was invoked upon the ground of diverse citizenship of the parties to an action, but the bill disclosed a second ground of jurisdiction in the allegations claiming that the ordinances of the city and law of the state were in contravention of the Constitution of the United States. These allegations presented a case in which the jurisdiction of the Circuit Court was not entirely dependent upon the opposite parties to the suit or contro-

versy being citizens of different states, and therefore, under section 5 of the act of March 3, 1891, the Supreme Court had exclusive jurisdiction."

It is suggested that where the jurisdiction of the Circuit Court rests both on diversity of citizenship and also because the bill invoking the jurisdiction of the Circuit Court shows a case involving the construction or application of the Constitution of the United States, and the jurisdiction of the Circuit Court is in issue, the whole case must be brought to this court from the Circuit Court and the jurisdiction of this court is exclusive.

Howard v. U. S., 184 U. S. 676.
St. Louis Cotton Compress Co. v. American Cotton Co. (C. C. A. 8th Circuit), 125 Fed. 196.
Wrightman v. Boone County, 31 C. C. A. 570.
Chicago, M. & St. P. Co. v. Evans, 7 C. C. A. 290.
Hugnley Mfg. Co. v. Galeton Cotton Mills, 184 U. S. 290.
Robinson v. Caldwell, 165 U. S. 359.
Loeb v. Columbia Township, 179 U. S. 472.
Ayres v. Polsdorfer, 187 U. S. 585.
Colo. Cent. Consolidated Min. Co. v. Turk, 150 U. S. 138.
Davis & F. Mfg. Co. v. Los Angeles, 189 U. S. 207.

2. Does the bill of complaint state facts showing that the jurisdiction of the Circuit Court was founded upon a controversy involving the construction or application of the Constitution of the United States?

The bill alleges that the Superior Court, without notice to any one, entered a decree probating the alleged nuncupative will. The bill alleges that the Superior Court did not acquire jurisdiction to hear any evidence or to take any action in regard to the probate of the will. The law of Washington upon the subject of the probate of a nuncupative will required that the next of kin should be summoned so that they could contest the will.

When the bill was filed more than six months had elapsed since the alleged speaking of the alleged testamentary words. If not already probated the will never could be probated. The mandate of the statute prohibited it.

"*No proof shall be received of any nuncupative will unless it be offered within six months after speaking the testamentary words*, nor unless the words or the substance thereof be first committed to writing and a citation *issued to the widow or next of kin of the deceased, that they may contest the will if they think proper.*"

> Pierce's Washington Code, Sec. 2352. Ballinger's Code, Sec. 4606 (Laws of 1854, page 316, Section 25).

"In all cases in which citations are issued from the Superior Court in probate proceedings, *they shall be served at least ten days before the term at which they are made returnable*, except when issued from the court in cases where the law requires the judge to issue them upon his own motion and he does so issue them, *and in such cases they shall be served in sufficient time to allow the person served to be in attendance on the court.*"

> Pierce's Code of Washington, Sec. 2331. Ballinger's Code, Sec. 6083.

Section 1303 of the Code of 1881 of the Territory of Washington provided:

"All process issuing out of the Probate Court shall be attested by the clerk and sealed with the seal of the court, and shall be served in the same manner as process issuing out of the District Court."

This section is still the law and is contained in Pierce's Washington Code, Sec. 2321.

The Superior Court of the State of Washington succeeded the Probate Court of the Territory. When personal service cannot be had in the Superior Court, service is made by publication.

It is claimed by the respondent Marie Carran that the

alleged will vested in her the entire real estate and personal property of the deceased. She could not, under the law of Washington of 1895, *supra*, assert any title to the real estate as a devisee until the will should be probated. She alleges in her answer that the Superior Court of the State of Washington for King County

"made and caused to be entered a decree in said court probating said will, and that said decree established the making, publishing and validity of such nuncupative will, and that said decree has been ever since and is now in full force and effect."

The Superior Court of the State of Washington for King County, in violation of the statute prohibiting it from hearing any proof of the alleged nuncupative will until the widow or next of kin had been cited, that they might contest the will, entered its decree of probate. On the strength of that decree, the respondent Marie Carrau has asserted that she is the sole legatee and devisee of the deceased, and she claims that the decree is conclusive against these petitioners, and that they have no standing as heirs at law or next of kin to ask the court to distribute the property to them, because she claims the deceased died testate and that his will has been duly probated (R. pp. 971, 977, 979).

The alleged decree of probate was not only made by the Superior Court without jurisdiction, but it was based upon the false testimony of witnesses, given *ex parte*. It was based upon a citation ordered by the court to be made returnable at an impossible date, and the citation conformed to the order for its issuance. The decree of probate is fair upon its face, but is false in fact.

Whenever the law requires notice to be given to a party, it means such a notice as will enable him to appear in time to defend himself against the claims of the other party.

In *Ball et al. vs. Clothier et al.*, decided by the Su-

preme Court of Washington March 12, 1904 (34 Wash. ——, not yet published),

The Supreme Court of Washington had before it the question whether the Probate Court, after the adoption of the State Constitution and prior to its jurisdiction being merged in the Superior Court, acquired jurisdiction to order a sale of real estate, without notice being given to minor heirs and without the appointment of a guardian for them. The notice was by publication, but the publication was not for a sufficient length of time.

The Court said:

"The petition for the sale of the land substantially complied with the statute, but there was no service or attempt at service of the petition or notice of the hearing upon the minor heirs, except an insufficient publication directed to all interested parties. No guardian *ad litem* was appointed for them. They had no general guardian. No appearance was made by any person for them upon the hearing as to the necessity for the sale. The court nevertheless directed the sale of the land. The sale was made on the date provided in the notice. A return thereof was subsequently made, and without an opportunity for objection, was confirmed, and a deed issued. The purchase price was paid and the estate had the benefit thereof. Appellants contend that the statute relating to notice and sale was merely directory; that the proceedings are *in rem*, and since the court had jurisdiction *in rem*, the sale was valid, notwithstanding irregularities. Conceding that the Probate Court had jurisdiction of the real estate for the purpose of administration upon the appointment of executors or administrators, as was said in Ackerson vs. Orchard, 7 Wash. 377, still before the heirs, who were the beneficiaries under the will, could be divested of their title, the substantial requirements of the statute must be complied with. The statute in force at the time the order was made provided that, when a petition for the sale of real estate was filed, the court should make an order directing all interested persons to appear, at a time and place specified, to show cause why the order should not be granted, and that this order should be personally served upon all persons

interested in the estate at least ten days before the hearing, or published four successive weeks in a newspaper. * * * If the court had jurisdiction over the estate, *it was also necessary that it acquire jurisdiction over the persons of the minor heirs before proceeding to divest them of their title, because the statute expressly required the minor heirs to be represented.* * * * When the statute required the appearance of the minor heirs by guardian *ad litem*, before the court should make the order of sale, it was necessary for such appearance, even if the proceedings were *in rem*. *The order of sale was therefore without the authority of law and was void as to the minor heirs.*"

In the case *in re Leonard's Will*, 47 Atl. 222, 65 N. J. L. 167,

citations were issued returnable at a time which had already passed. The court said:

"The citations issued by the Surrogate were as if no return day had been inserted therein, for the day named was an impossible date."

In *Randolph v. Bague*, 44 Cal. 370,

the court said:

"Although proceedings for the proof of wills are usually treated as proceedings *in rem*, yet if the statute requires that certain persons shall be notified, such provisions must be complied with in order to give the court jurisdiction."

In *Charlebois v. Bourdon Admr.*, 6 Mont. 373,

the court said:

"The statute in relation to the probate of wills provides that, when the petition is filed and the will produced, the probate judge must fix a day for hearing the petition. Notice of the hearing shall be given by the clerk of the court by publishing the same in a newspaper of the county. * * * * The statute also provides that at the time appointed for the hearing, the court must require proof that the notice of the hearing has been given, which being made, the court must hear the testimony in proof of the will. * * * The court is authorized to

hear the testimony in proof of the will, after proof of notice of the hearing has been given. But there is no authority to hear the testimony before proof of notice. Notice as provided by the law gives jurisdiction. The probate court is of limited jurisdiction. It has its life and being in the statutes. It possesses such authority as is conferred. Jurisdiction comes to it by observing the law. The hearing for the admission of a will to probate is in the nature of an action, and the order thereon is in the nature of a judgment. The heirs at law have the right to be heard. They have the right to be present at the hearing; and if they are not notified thereof and an order is made without giving them an opportunity to be heard or to contest the admission of the will to probate, they would stand in very much the same position as if a judgment had been rendered against them without bringing them into court and giving them an opportunity to answer or defend."

To the same effect are the following cases:

Dupevier v. Berard, 31 So. 653; 107 La. 91.
Perez v. Perez, 59 Tex. 322.
Ashhurst v. Fountain, 67 Cal. 18.
Spencer v. Houghton, 68 Cal. 82.

In *Winsor v. McVeigh*, 93 U. S. 274, 277,
this court said:

"A sentence of a court pronounced against a party without hearing him or giving him an opportunity to be heard, is not a judicial determination of his rights, *and is not entitled to respect in any other tribunal.* That there must be notice to the party of some kind, actual or constructive, to a valid judgment affecting his rights, is admitted. *Until notice is given the court has no jurisdiction in any case to proceed to judgment, whatever its authority may be by the law of its organization, over the subject matter.*"

In *Roller v. Holley*, 176 U. S. 398,
the question before this court was whether a judgment of a court of Texas in a proceeding *in rem* affecting the property of a defendant served with process in Virginia, re-

quiring him to appear and defend the action in Texas within five days, had been rendered without due process of law. This court said:

"In short, for aught that appears here, parties may be called from the uttermost parts of the earth to come to Texas and defend suits against them within five days from the day the notice is served upon them. * * * *That a man is entitled to some notice before he can be deprived of his liberty or property, is an axiom of the law to which no citation of authority would give additional weight*, but upon the question of the length of such notice there is a singular dearth of judicial decision. It is manifest that the requirement of notice would be of no value whatever unless such notice were reasonable and adequate for the purpose. * * * Without undertaking to determine what is a reasonable notice to non-residents, we are of opinion, under the circumstances of this case, and considering the distance between the place of service and the place of return, *that five days was not* a reasonable notice *or due process of law, and that the judgment obtained upon such notice was not binding upon the defendant.*"

It is respectfully submitted that if five days is not due process of law because not a reasonable time within which to require a defendant in an action *in rem*, who is served with process in the state of Virginia, to appear in the courts of Texas and defend his rights, there is no possible theory upon which a decree, probating an oral will disinheriting these petitioners and declaring the claimant under the alleged nuncupative will to be the legatee and devisee of the entire estate, can be sustained, when the statute required notice, and the decree was founded on a citation requiring these petitioners, then in Ireland, to appear on the day of its issuance at an hour already past to defend their rights in the courts of the State of Washington, six thousand miles distant. The Circuit Court well designated the citation "a mockery." To recognize the decrees based upon it as capable of conferring rights would be to convert the requirement of notice provided in the statute into "a delusion, a mockery and a snare."

The decree of probate was, therefore, rendered without jurisdiction, without due process of law, and to give it effect, or to recognize it in any manner as the basis of any claim on the part of the respondent Marie Carrau, is to deprive these petitioners of their property without due process of law, in contravention of the Fourteenth Amendment of the Constitution of the United States. The bill so alleged. This allegation the respondent Marie Carrau denied.

The opinion of the Circuit Court not only held that these petitioners were the heirs at law and next of kin of the deceased, and as such entitled to challenge the alleged nuncupative will, because it never was executed, but that the decree of probate, based upon a citation requiring these petitioners to appear at a time which was already past at the time of its issuance, was a nullity and that no effect could be given to it as against the petitioners (R. pp. 241, 242).

The Circuit Court, therefore, rested its decision in part upon the proposition that to give effect to the decree of probate would be to deprive these petitioners of their property without due process of law.

Inasmuch, therefore, as the bill alleged the foregoing facts, it showed that the jurisdiction of the Circuit Court could be rested upon a ground entirely separate and apart from diversity of citizenship.

3. If the bill does not state such a controversy, is there a right of appeal to this court from the decree of the United States Circuit Court of Appeals deciding the question of jurisdiction only and reversing a decree rendered by the Circuit Court on the merits in favor of the party who invoked the jurisdiction of that court when the jurisdiction of the Circuit Court was in issue?

It is perfectly clear that, had the Circuit Court of the United States for the District of Washington dismissed

the bill of petitioners for want of jurisdiction, petitioners could have had the question of jurisdiction certified to this court and here determined. Does the fact that the Circuit Court sustained the jurisdiction, invoked by these petitioners, and decided the case upon the merits in their favor cut off the right of these petitioners to have the question of jurisdiction determined by this court, because the Circuit Court of Appeals, on the appeal of the respondent here, has determined it against them and has refused to hear the case upon the merits? The decisions of this court hold that, where the jurisdiction of the Circuit Court is in issue, and the jurisdiction is sustained and a decree rendered upon the merits, the defeated party has the right to take an appeal, on the question of jurisdiction alone, to this court, and to have the jurisdictional question certified to this court, or he has the right to appeal the whole case to the Circuit Court of Appeals, and that, if the decision of the Circuit Court of Appeals is against him, he has no appeal to this court. If, however, the Circuit Court of Appeals refuses to decide the case upon the merits and decides against the jurisdiction of the Circuit Court, does the successful party in the Circuit Court lose his right to have the jurisdictional question determined by this court?

The Circuit Court of Appeals refused to certify the question of jurisdiction to this court. If, instead of allowing an appeal to this court, the Circuit Court of Appeals had remanded the cause to the Circuit Court, with instructions to dismiss the bill for want of jurisdiction, and the Circuit Court had entered a decree dismissing the bill for want of jurisdiction, could these petitioners have appealed therefrom and have had the jurisdictional question then certified to this court? If they could not, then the law is in this peculiar condition: By reason of the election of the defeated party to take a case involving the jurisdiction of the Circuit Court to the United States Circuit Court of Appeals upon the whole case, the successful party, who has

had no election, is deprived of his right to have this court pass upon the question of jurisdiction.

In the case of *Pullman Palace Car Co. v. Central Transportation Co.*, 171 U. S. 138,

this court, in view of the doubt as to which court an appeal should have been taken to, issued the writ of *certiorari*.

We submit that, unless it is perfectly clear in this case that the decision of the United States Circuit Court of Appeals is not final, then the writ of *certiorari* should be issued to review its decree, the decree of the Circuit Court of Appeals should be reversed and that the whole case being brought to this court, the decree of the Circuit Court of the United States for the District of Washington should be affirmed.

Respectfully submitted,

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